RECORD AND BRIEFS

17-333

No.

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In the Supreme Court of the United States

O. JOHN BENISEK, EDMUND CUEMAN, JEREMIAH DEWOLF, CHARLES W. EYLER, JR., KAT O'CONNOR, ALONNIE L. ROPP, *and* SHARON STRINE,

Appellants,

v.

LINDA H. LAMONE, *State Administrator of Elections, and* DAVID J. MCMANUS, JR., *Chairman of the Maryland State Board of Elections,*

Appellees.

On Appeal from the United States District Court for the District of Maryland

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

This case is a First Amendment challenge to the partisan gerrymander of a single federal congressional district. Plaintiffs allege that state officials responsible for Maryland's 2011 congressional redistricting plan targeted them for vote dilution because of their past support for Republican candidates for public office, violating the First Amendment retaliation doctrine.

In earlier proceedings in this case, this Court held that plaintiffs' retaliation claim is a substantial one, required to be heard by a three-judge district court. On remand, the three-judge court held that plaintiffs' retaliation claim is justiciable. The district court, in a divided opinion, thereafter denied plaintiffs' motion for a preliminary injunction, from which this appeal is taken.

This appeal presents the following questions:

1. Did the majority err in holding that, to establish an actual, concrete injury in a First Amendment retaliation challenge to a partisan gerrymander, a plaintiff must prove that the gerrymander has dictated and will continue to dictate the outcome of every election held in the district under the gerrymandered map?

2. Did the majority err in holding that the *Mt. Healthy* burden-shifting framework is inapplicable to First Amendment retaliation challenges to partisan gerrymanders?

3. Regardless of the applicable legal standards, did the majority err in holding that the present record does not permit a finding that the 2011 gerrymander was a but-for cause of the Democratic victories in the district in 2012, 2014, or 2016?

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INTRODUCTION

This case is unlike any previous challenge to partisan gerrymandering. It does not invoke the Equal Protection Clause in any respect. It does not rest upon statistical measures of partisan imbalance. It does not ask the Court to adopt any new doctrinal frameworks or approve any new legal standards. This case relies, instead, entirely upon a time-tested, judge-approved legal framework: the First Amendment retaliation doctrine.

Citizens of course enjoy a First Amendment right not to be "burden[ed] or penaliz[ed]" for their "voting history," their "association with a political party," or their "expression of political views." *Vieth* v. *Jubelirer*, 541 U.S. 267, 314 (2004) (Kennedy, J., concurring in judgment). Thus, "[i]f a court were to find that a State did impose burdens and restrictions on groups or persons by reason of their views, there would likely be a First Amendment violation." *Id.* at 315. In this way, "the First Amendment's protection of citizens from official retaliation based on their political affiliation" necessarily "limit[s] the State's power to rely exclusively on partisan preferences in drawing district lines." *League of United Latin Am. Citizens* v. *Perry*, 548 U.S. 399, 461 (2006) (Stevens, J., concurring in part and dissenting in part, joined by Breyer, J.).

That is the theory presented in this challenge to Maryland's 2011 redistricting plan. The record here shows that Governor Martin O'Malley and other top state officials specifically intended to dilute the votes of Republicans in the State's Sixth Congressional District because of those citizens' support for Republican Roscoe Bartlett, the district's representative for the preceding 20 years. To that end, the mapdrawers

reshuffled fully *half* of the district's 720,000 residents—far more than necessary to correct the mere 10,000-person imbalance in the district's population following the 2010 census. The net result of this fundamental reconfiguration of the district's lines was a more than 90,000-voter swing in favor of Democrats, after which registered Republicans' share of the electorate fell from 47% to just 33%.

The 2011 gerrymander was devastatingly effective. According to two metrics that analyze precinct-by-precinct voter history (including the metric used by the mapdrawers to manipulate the map's lines in this case), there was a 99.7%-100% chance that Congressman Bartlett would win reelection in 2010, before the gerrymander. But the massive swap of Republican voters for Democratic voters in the 2011 redistricting turned the table 180 degrees, making it 92.5%-94.0% likely that a Democrat would win in 2012. No other congressional district anywhere in the Nation saw so large a swing in its partisan complexion following the 2010 census. And we know from the metrics' focus on precinct-by-precinct voter history that the swing was a consequence of the reconfiguration of the district's lines alone.

The results, in practice have been precisely as intended. Whereas Congressman Bartlett won reelection to Congress in 2010 by a 28% margin, he was routed by now-Congressman John Delaney in 2012 by a 21% margin. Congressman Delaney has won reelection ever since. The evidence shows further that, since the redistricting, Republicans' political engagement has plummeted in the counties comprising the old Sixth District. Turnout for Republican primary elections, for example, has dropped by as much as one-third throughout the district.

Plaintiffs here—seven Republicans who all live and voted within the bounds of the former Sixth District—sued, alleging that Maryland lawmakers had specifically intended to burden their representational rights because of their past support for Congressman Bartlett and that they suffered actual injury as a result. Following initial discovery, they moved for a preliminary injunction.

A divided three-judge district court nevertheless denied plaintiffs' motion for a preliminary injunction because, in its view, the balance of evidence here (including the closeness of Congressman Delaney's reelection in 2014) "calls into doubt whether the State engineered an *effective* gerrymander." App., *infra*, 17a. Blinking reality, the majority speculated that the electoral outcomes in 2012 onward might be attributable to changes in voter sentiment or other unidentified, ethereal forces "present in every election." *Ibid.*

As Judge Niemeyer put it in his dissent, the majority's conclusion on this score "overlooks the obvious" and rests on "bizarre" and "abstract" notions of causation "that bear no relationship to the real world evidence" at issue in this case. App., *infra*, 34a. But there is more wrong with the majority's analysis than that. The majority mistakenly concluded that plaintiffs' injury inheres in Republican candidates' electoral losses in the Sixth District, rather than in the dilution of plaintiffs' and other Republicans' votes that ensured those losses. On the basis of that misimpression, the majority held that, to establish an actual injury, plaintiffs must prove that the 2011 gerrymander has independently changed and will "continue to control" the outcome of every election held under the 2011 redistricting map. App., *infra*,

17a. For related reasons, the majority refused to apply the *Mt. Healthy* burden-shifting framework, which—in other First Amendment retaliation contexts—shifts the burden to the defendant to disprove but-for causation when the plaintiff has made a prima facie showing of intent and injury.

In the end, the majority simply misunderstood the nature of the injury inflicted by a partisan gerrymander. Plaintiffs' injury consists in official "interference with an opportunity to elect a representative of one's choice" (*Davis* v. *Bandemer*, 478 U.S. 109, 133 (1986) (plurality opinion)), not in particular election results. To be sure, the fact that a gerrymander successfully changes the outcome of an election is strong evidence that the burden inflicted is real, and more than *de minimis*; changing electoral outcomes is, after all, the *point* of a gerrymander. But it does not follow that, to establish a cognizable injury in a First Amendment retaliation challenge to a partisan gerrymander, a plaintiff must show that each and every electoral outcome is (and will continue to be) singularly attributable to the gerrymander. On the contrary, a First-Amendment-retaliation plaintiff is entitled to relief upon proof of any actual, concrete injury—which is to say any injury that is more than *de minimis*. Plaintiffs here have satisfied that requirement many times over.

Against this backdrop, the Court should note probable jurisdiction and order expedited briefing and argument. As we explain in greater detail in the motion to expedite filed today, it is not too late to obtain relief for the forthcoming 2018 election cycle, but expedited review would ensure that plaintiffs' appeal is not denied by default.

In addition, the Court has before it an appeal in *Gill* v. *Whitford*, No. 16-1161. The instant appeal, for its part, presents an opportunity not only to consider the discrete legal questions presented in this brief, but also the viability of plaintiffs' First Amendment retaliation claim as a whole, which the State no doubt will challenge. It is therefore a natural complement to *Gill*. Although both cases are partisan gerrymandering challenges warranting plenary review in their own rights, they involve different theories. Considering the cases in parallel would provide the Court with a broader spectrum of legal arguments and evidence with which to address the problem of partisan gerrymandering. It also would guard against the possibility that consideration of *Gill* alone, without the benefit of full briefing in this case, could lead the Court to overlook arguments or make inadvertent statements that confuse the law or foreclose meritorious claims.

What is more, the majority below repeatedly expressed a desire to have this Court's "guidance" before proceeding further with the litigation. App., *infra*, 13a, 16a, 29a, 31a. It hoped, in particular, to have this Court's confirmation "that it is proceeding on the correct legal foundation," lest it "charg[e] ahead only to later learn that" plaintiffs' claim is not actually "viable." *Id.* at 33a. The lower court believed such guidance might come from *Gill*, but given the significant differences between the two cases—including Wisconsin's focus on the statewide nature of the *Gill* plaintiffs' claim—that is unlikely.

The Court accordingly should note probable jurisdiction, order expedited briefing and argument for the reasons given in the accompanying motion to expedite, and reverse.

OPINIONS BELOW

The opinion and order denying the State's motion to dismiss and holding appellants' claims justiciable (App., *infra*, 80a-129a) is reported at 203 F. Supp. 3d 579. The district court's opinion and order denying appellants' motion for a preliminary injunction (App., *infra*, 1a-79a) is available in the Westlaw database at 2017 WL 3642928.

JURISDICTION

The three-judge district court, convened pursuant to 28 U.S.C. § 2284(a), denied plaintiffs' motion for a preliminary injunction on August 24, 2017. Plaintiffs filed a notice of appeal on August 25, 2017. The Court has jurisdiction under 28 U.S.C. § 1253.

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Article I, Section 2 of the United Sates Constitution provides in relevant part that "[t]he House of Representatives shall be composed of Members chosen every second Year by the People of the several States."

STATEMENT

This Court previously decided an appeal in this case on writ of certiorari, holding that plaintiffs' First Amendment claim was substantial and should have been referred to a three-judge district court pursuant to 28 U.S.C. § 2284. See *Shapiro* v.

McManus, 136 S. Ct. 450 (2015). On remand to the three-judge court, plaintiffs filed an amended complaint that added new plaintiffs and clarified their First Amendment claim. The case was subsequently re-captioned *Benisek* v. *Lamone*.

A. The opinion on justiciability

This is a First Amendment retaliation challenge to the 2011 redrawing of Maryland's Sixth Congressional District. Plaintiffs allege that the officials responsible for Maryland's 2011 redistricting intentionally diluted their votes because of their past support for Republican candidates for office, causing them tangible injury.

The State moved to dismiss, arguing that plaintiffs' claim is nonjusticiable.

1. The district court, in an opinion by Judge Niemeyer, denied the motion. App., *infra*, 80a-111a. The majority began by explaining that "when a State draws the boundaries of its electoral districts so as to dilute the votes of certain of its citizens, the practice imposes a burden on those citizens' right to 'have an equally effective voice in the election' of a legislator to represent them." *Id.* at 100a (citation omitted). "The practice of *purposefully* diluting the weight of certain citizens' votes to make it more difficult for them to achieve electoral success *because of* the political views they have expressed through their voting histories and party affiliations thus infringes this representational right." *Id.* at 101a.

"A plaintiff bringing a garden variety retaliation claim under the First Amendment," the majority went on, "must prove that the responsible official or officials were motivated by a desire to retaliate against him because of his speech or other conduct

protected by the First Amendment and that their retaliatory animus caused the plaintiff's injury." App., *infra*, 102a. "Because there is no redistricting exception to this well-established First Amendment jurisprudence, the fundamental principle that the government may not penalize citizens because of how they have exercised their First Amendment rights thus provides a well-understood structure for claims challenging the constitutionality of a State's redistricting legislation—a discernible and manageable standard." *Id.* at 104a.

Thus, the majority concluded:

> When applying First Amendment jurisprudence to redistricting, we conclude that, to state a claim, the plaintiff must allege that those responsible for the map redrew the lines of his district with the *specific intent* to impose a burden on him and similarly situated citizens because of how they voted or the political party with which they were affiliated. In the context of redistricting, this burden is the *injury* that usually takes the form of *vote dilution*. But vote dilution is a matter of degree, and a *de minimis* amount of vote dilution, even if intentionally imposed, may not result in a sufficiently adverse effect on the exercise of First Amendment rights to constitute a cognizable injury. Instead, to establish the injury element of a retaliation claim, the plaintiff must show that the challenged map diluted the votes of the targeted citizens to such a degree that it resulted in a tangible and concrete adverse effect. In other words, the vote dilution must make some practical difference. Finally, the

> plaintiff must allege *causation*—that, absent the mapmakers' intent to burden a particular group of voters by reason of their views, the concrete adverse impact would not have occurred.

App., *infra*, 104a.

Crucially, "[t]his standard contains several important limitations that help ensure that courts will not needlessly intervene in what is quintessentially a political process." App., *infra*, 105a. *First*, "it does not prohibit a legislature from taking *any* political consideration into account in reshaping its electoral districts." *Ibid.* "Rather, what implicates the First Amendment's prohibition on retaliation is not the use of data reflecting citizens' voting history and party affiliation, but the use of such data for the purpose of making it harder for a particular group of voters to achieve electoral success because of the views they had previously expressed." *Ibid.*

Second, "merely proving that the legislature was aware of the likely political impact of its plan and nonetheless adopted it is not sufficient to prove that the legislature was motivated by the type of intent necessary to sustain a First Amendment retaliation claim." App., *infra*, 106a.

Finally, "the standard requires proof that the vote dilution brought about by the redistricting legislation was sufficiently serious to produce a demonstrable and concrete adverse effect on a group of voters' right to have 'an equally effective voice in the election' of a representative." App., *infra*, 106a (citation omitted).

The district court thus "recognize[d] the justiciability of a claim challenging redistricting under the First Amendment and Article I, § 2." *Id.* at 108a.

2. Judge Bredar dissented. App., *infra*, 112a-129a. He clarified at the outset that he did not defend "the State's authority to segregate voters by political affiliation so as to achieve pure partisan ends," which is a "noxious" practice that "has no place in a representative democracy." *Id.* at 112a-113a. Nor did Judge Bredar mean "to understate the prevalence of political gerrymandering." *Id.* at 113a. But Judge Bredar voted to grant the State's motion to dismiss nevertheless because, in his view, "[c]ourts are simply not equipped to ascertain those unusual circumstances in which redistricting inflicts an actual, measurable burden on voters' representational rights." *Id.* at 114a. Put another way, according to Judge Bredar, "[c]ourts cannot reliably distinguish between what Plaintiffs would term impermissible 'vote dilution' and the ordinary consequences of an American political process that is organic, fluid, and often unpredictable." *Id.* at 115a. On that basis, Judge Bredar concluded that "Plaintiffs here have [not] discovered a viable solution" to partisan gerrymandering. *Id.* at 129a.

B. The motion for a preliminary injunction

The parties entered discovery. The State asserted state legislative privilege as a basis for refusing to produce documents and witnesses, but the district court unanimously granted plaintiffs' motions to compel. See *Benisek* v. *Lamone*, 2017 WL 959641 (D. Md. 2017). We thereafter deposed and obtained documents from Governor Martin O'Malley and other high state officials who participated in the redistricting.

At the close of discovery, plaintiffs moved for a preliminary injunction. Dkt. 177. We argued that the evidence establishes each element of plaintiffs' First

Amendment retaliation claim and that, without an immediate injunction, plaintiffs will suffer irreparable injury in the 2018 election cycle.

Concerning *intent*, Governor O'Malley and others testified that those responsible for the 2011 redistricting expressly intended to dilute the votes of Republicans in the former Sixth District because of their past support for Congressman Bartlett. There is no ambiguity in the record on this point. Governor O'Malley explained with admirable candor that it was "clearly [his] intent" (Dkt. 177-3, at 82:18) and the "intent" of "those of us in leadership positions in our party" (*id.* at 81:1-10) "to create a map that would" result in a "district where the people would be more likely to elect a Democrat than a Republican" (*id.* at 82:15-18). To achieve this end, Governor O'Malley and the mapdrawers singled out Republicans for vote dilution using voter-history and party-affiliation data. *Id.* at 65:12-13.

Eric Hawkins—the political consultant retained by Congressman Steny Hoyer to draft the blueprint for the redistricting plan—confirmed the same. By targeting voters using the "Democratic Performance Index," a proprietary metric reflecting "past voting behavior" and "past voting history" (Dkt. 177-4, at 23:19-24:19), Hawkins drew the lines of the Sixth District with the express purpose of "see[ing] if there was a way to get another Democratic district in the state" (*id.* at 230:19-20).

Concerning *burden*, we showed that Republican votes were diluted in the Sixth District. Prior to the redistricting, the Sixth District was majority Republican; it had elected a Republican congressman in each election over the past 20 years. That ended after 2011. Approximately one-half of the district's

population was shuffled; the areas moved out of the district contained 66,417 *more* Republican than Democratic voters, whereas the areas moved into the contained 24,460 *fewer* Republican than Democratic voters. Dkt. 177-19, at 6. The net result of the "massive interchange of territory" in the Sixth District was a more than 90,000-voter swing in favor of Democrats, after which registered Republicans' share of the electorate dropped to just 33%. Dkt. 177-35, at 59, 67. Redistricting expert Prof. Michael McDonald thus confirmed what was already obvious: "Maryland's adopted Sixth Congressional District was drawn in a manner that has the effect of diminishing the ability of registered Republican voters to elect candidates of their choice." Dkt, 177-19, at 3; see also *id.* at 5-9.

We showed further that the vote dilution inflicted upon Republicans in the Sixth District was not *de minimis* and amounted to an actual, concrete injury. According to Eric Hawkins (the redistricting expert hired by Congressman Hoyer to spearhead the mapdrawing effort), "past voter behavior" and "past voter history" is the best predictor of future voter behavior. Dkt. 177-4, at 23:19-24:19; 202:6-203:15. Thus, the most respected and accurate metrics for predicting elections outcomes—including the "Cook Partisan Voter Index" and the proprietary Democratic Performance Index used by Hawkins to engineer the 2011 gerrymander—rely on regression models of voter history. *Id.* at 24:17-19; Dkt. 177-49, at 131:6-21.

According to these predictive metrics, the partisan composition of the Sixth District made it nearly certain (99.7%-100%) that a *Republican* would win the race for Congress in 2010. Dkt. 191, at 7-9 (col-

lecting evidence). The same metrics showed that, as a consequence of redrawing the district's lines to dilute Republican votes in 2011, it became nearly certain (92.5%-94.0%) that a *Democrat* would win in 2012. *Ibid.* No other district anywhere in the country saw so huge a swing in its partisan composition. Dkt. 177-52, at 8. And the results have been precisely as predicted: The Democratic nominee, John Delaney, has won the race for Congress in each election in the Sixth District since 2011. Dkt. 104, ¶¶ 53-56.

Thus, as Dr. McDonald opined, the vote dilution visited upon Republican voters in the Sixth District "had a concrete impact on electoral outcomes because Republican voters in the adopted district have, as a consequence, been unable to elect a candidate of their choice." See Dkt. 177-19, at 3.

What is more, the dilution of Republican votes in 2011 has palpably depressed political participation in the Sixth District. Most notably, turnout for the Republican primaries in midterm years—when congressional candidates are at the top of the ticket and most likely to drive voters to the polls—has plummeted in the district since 2011, in some counties by more than one-third. See Dkt. 191-11. As Plaintiff Sharon Strine testified, when she canvassed for the Republican candidate in 2014, voters told her "it's not worth voting anymore" and that they "feel disenfranchised." Dkt. 177-53, at 61:2-64:2. Against this backdrop, we argued, plaintiffs' representation rights have been concretely burdened.

Concerning *but-for causation*, we made two points. We argued, first, that we did not bear the burden to prove causation. Instead, when a First Amendment retaliation plaintiff establishes intent and injury, this Court's precedents place the burden

on the defendants to prove (if they can) that the injury would have come about regardless of the retaliatory intent. See *Mt. Healthy City Sch. Dist. Bd. of Educ.* v. *Doyle*, 429 U.S. 274 (1977).

We argued, second, that the alternative justifications given by the State to explain the massive interchange of territory between the Sixth and Eighth Districts (resulting in the dilution of Republican votes) were meritless. The principal alternative explanation cited by the State for the cartographic contortions in the Sixth District was the mapdrawers' supposed respect for the "I-270 corridor" as a community of interest. But the evidence shows that none of the officials who were actually responsible for drawing or approving the map ever considered the I-270 corridor. See Dkt. 177-1, at 21-22 (collecting evidence). Indeed, the testimony repeatedly confirmed that the mapdrawers were pursuing just two goals: protecting incumbent Democratic representatives and flipping the Sixth District to Democratic control. *E.g.*, Dkt. 177-4, at 47:17-49:2.

Finally, we showed that each of the remaining elements necessary for injunctive relief—irreparable harm, the balance of hardships, and the public interest—all strongly favor enjoining enforcement of the 2011 redistricting plan.

C. The denial of the preliminary injunction

1. Judge Bredar, joined by Judge Russell, denied the motion. App., *infra*, 1a-34a.

The majority concluded, in the main, that plaintiffs had failed to show that the 2011 gerrymander caused them an actual, more-than-*de-minimus* injury. On this score, the majority held that, in the context of a gerrymander, "the government's 'action'

is only 'injurious' if it actually alters the outcome of an election" (app., *infra*, 24a) and that to meet their burden to show causation, plaintiffs therefore must prove both "that it was the gerrymander ([and not the] host of forces present in every election) that flipped the Sixth District" in 2012, 2014, and 2016. *Id.* at 17a. Plaintiffs must also prove, according to the majority, that the gerrymander independently "will continue to control the electoral outcomes" in all future elections in the Sixth District. *Ibid.*

The majority concluded that plaintiffs had not satisfied that requirement. It was concerned, in particular, that the close margin of the Democratic victory in 2014, "calls into doubt whether the State engineered an *effective* gerrymander." *Ibid.* Accord *id.* at 27a-28a.

The majority acknowledged that "[t]rial testimony and other evidence * * * may yet establish that Plaintiffs have met their burden of proof with respect to causation" so understood, "but the Court is not persuaded that they have done so now, at least not to the high standard set for the granting of preliminary injunctions." App., *infra*, 18a. The Court thus stressed that it was applying a high standard with respect to the merits of plaintiffs' claim: "[T]he Court cannot say that it is *likely* that Plaintiffs will prevail on this element—only that they *might*." *Ibid.*

In reaching this decision, the majority also declined "to import into the political gerrymandering context the burden-shifting framework of *Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274 (1977)." App., *infra*, 23a-24a. "The problem," according to the majority, is that "the question of but-for causation is closely linked to the very existence of an injury: if an election result is not

engineered through a gerrymander but is instead the result of neutral forces and voter choice, then no injury has occurred." *Id.* at 24a. For this reason, the majority concluded that plaintiffs bear the burden of proving that no other factor independently explains the electoral outcomes under the 2011 redistricting plan. *Ibid.* And the majority concluded that plaintiffs had not proved that negative. *Id.* at 20a-21a.

The majority summed up by reiterating its conviction that "political gerrymandering is a noxious and destructive practice" and affirmed that it "will not shrink from its responsibility to adjudicate any viable claim that such segregation has occurred in Maryland." App., *infra*, 33a.

Before "charging ahead" with further proceedings, however, the majority stayed the litigation to await this Court's guidance—that is, to ensure "that in measuring the legality and constitutionality of any redistricting plan in Maryland [the court] is measuring that plan according to the proper legal standard." App., *infra*, 33a-34a.[1]

2. Judge Niemeyer dissented. App., *infra* 34a-79a. In his view, "the record amply proves that the State violated the First Amendment under the standard we previously adopted in this case." *Id.* at 77a. "Indeed, on this record," according to Judge Niemeyer, "there is no way to conclude otherwise." *Ibid.* "The plaintiffs have not only made the requisite showing that they are likely to succeed on the merits, they have actually succeeded well in demonstrating

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[1] Judge Bredar also reiterated his conclusion that plaintiffs' claim is nonjusticiable. See App., *infra*, 7a-17a. Judge Russell did not join that portion of Judge Bredar's opinion.

that the State's gerrymandering violated their First Amendment rights." *Id.* at 40a.

As a starting point, Judge Niemeyer rejected the majority's view of the evidence: "[T]he record could not be clearer that the mapmakers specifically intended to dilute the effectiveness of Republican voters in the Sixth Congressional District and that the actual dilution that they accomplished was caused by their intent." App., *infra*, 34a-35a. Judge Niemeyer characterized the majority's contrary conclusion as "overlook[ing] the obvious and rel[ying] on abstract notions of the causal relationship between intent and effect that bear no relationship to the real world evidence regarding the conduct at issue." *Id.* at 34a.

After recounting the evidence supporting plaintiffs' motion (app., *infra*, 40a-53a), Judge Niemeyer turned to what he believed to be the majority's "two significant errors" of law (*id.* at 74a).

First, according to Judge Niemeyer, the majority misunderstood the nature of the injury that plaintiffs must prove. It is not plaintiffs' burden to show that the outcome of every election was (or will continue to be) dictated by the gerrymander; instead, they must demonstrate that they "experienced a 'demonstrable and concrete adverse effect' on [their] 'right to have 'an equally effective voice in the election' of a representative.'" App., *infra* 68a-69a.

"[W]hile the State's linedrawing need not change the outcome of an election to be culpable" under this standard, Judge Niemeyer explained, "the fact that a Democratic candidate was elected in the three elections following the 2011 redistricting supports the fact that the Republican voters have suffered constitutional injury." App., *infra*, 69a-70a. But the majority's view that plaintiffs' "injury takes the form of

Bartlett's loss to Delaney" in and of itself reflects "a failure to understand First Amendment jurisprudence, which focuses not on who wins but on the burden imposed on First Amendment rights." *Id.* at 75a. It is enough, in other words, "to show that a voter was targeted because of the way he voted in the past and that the action put the voter at a concrete disadvantage." *Id.* at 39a.

Second, Judge Niemeyer faulted the majority for refusing to apply the *Mt. Healthy* burden-shifting framework. "The majority accepts that the defendants here *did in fact intend* to retaliate against voters who had previously voted for Republican candidates in the Sixth District" and that, under the adopted map, "Republicans' voice was diminished and the Democrats *achieved unprecedented electoral success*." App., *infra*, 76a. According to Judge Niemeyer, "only one conclusion can be drawn from these accepted facts—that a degree of vote dilution significant enough to place Republican voters at a concrete electoral disadvantage was caused by the conduct that the State specifically intended." *Ibid.* "Yet, somehow," Judge Niemeyer wondered, "the majority holds that these actions *did not cause* the retaliatory harm that the State intended" to bring about, and that "the State's plan was ineffective, despite its intended effect coming to pass." *Ibid.* "[A]pplying a causation standard that seeks to eliminate all possible but unproved factors, however remote and speculative," Judge Niemeyer concluded, "is directly contrary to the causation standard that the Supreme Court has established for retaliation claims." *Id.* at 77a.

"In sum," Judge Niemeyer concluded, "this fulsome record overwhelmingly shows the plaintiffs'

satisfaction of our First Amendment standard." App., *infra*, 79a. Reasoning that every other factor favored an injunction (*id.* at 77a-79a), Judge Niemeyer would have granted a preliminary injunction.

REASONS FOR NOTING PROBABLE JURISDICTION

This First Amendment retaliation challenge to Maryland's 2011 redistricting plan presents a number of substantial questions of constitutional law that call out for full briefing and argument and ultimately reversal. The majority below committed a series of fundamental legal errors that go to the heart of plaintiffs' theory of this case. Immediate correction of those errors is imperative, before the parties and the lower court dedicate substantial additional resources to further discovery and trial.

What is more, this case is a natural companion to *Gill* v. *Whitford*, No. 16-1161. Like *Gill*, it is a constitutional challenge to partisan gerrymandering. Yet, as a single-district case, it suffers from none of the supposed infirmities of the statewide claim at issue in *Gill*; and it is grounded exclusively in the First Amendment rather than the Equal Protection Clause.

Because the Court has "no discretion to refuse adjudication of the case on its merits" in appeals brought under § 1253, and because the questions presented here are substantial (*McCutcheon* v. *FEC*, 134 S. Ct. 1434, 1444 (2014)), the Court should note probable jurisdiction, order expedited briefing and argument for the reasons stated in the motion to expedite filed with this brief, and reverse.

I. PLAINTIFFS HAVE PROVED EACH ELEMENT OF THEIR FIRST AMENDMENT RETALIATION CLAIM

A. It is black letter law that "the First Amendment bars retaliation for protected speech." *Crawford-El* v. *Britton*, 523 U.S. 574, 592 (1998). That rule applies naturally in the context of partisan gerrymandering.

"[P]olitical belief and association constitute the core of those activities protected by the First Amendment." *Elrod* v. *Burns*, 427 U.S. 347, 356 (1976). Thus, citizens enjoy a First Amendment right not to be "burden[ed] or penaliz[ed]" for their "voting history," "association with a political party," or "expression of political views." *Vieth*, 541 U.S. at 314 (Kennedy, J., concurring in judgment). "In the [specific] context of partisan gerrymandering, that means that First Amendment concerns arise where an apportionment has the purpose and effect of burdening a group of voters' representational rights." *Ibid.* And "[i]f a court were to find that a State did impose burdens and restrictions on groups or persons by reason of their views, there would likely be a First Amendment violation." *Id.* at 315. That is the theory underlying plaintiffs' claim in this case.

B. The district court held that plaintiffs would be entitled to injunctive relief if they proved that state officials responsible for the 2011 redistricting (1) specifically intended (2) to dilute Republicans' votes because of their past support for Republican candidates for public office, (3) resulting in actual injury. See App., *infra*, 80a-111a.

Measured against this framework, plaintiffs have proved entitlement to relief.

1. To begin, several high-level Maryland lawmakers, including Governor Martin O'Malley, confirmed that they specifically intended to dilute Republican votes in the Sixth District by moving Republican voters out of the district *en masse* and replacing them with Democratic and independent voters. See Dkt. 177-1, at 10-14. As Judge Niemeyer found (and the majority did not disagree), "the record admits of no doubt" on this point. App., *infra*, 64a.

2. The record likewise admits of no doubt that Republican votes were, in fact, diluted in the Sixth District as a result of the mapdrawers' efforts. The areas moved out of the district resulted in a net *loss* of 66,417 Republican voters, and the areas moved into the district resulted in a net *gain* of 24,460 Democratic voters, culminating in a 90,877-vote swing in favor of Democrats. Dkt. 177-19, at 6. There was thus no disagreement among the experts for both sides that the result was a dramatic diminishment of Republican voters' opportunity to elect a candidate of their choice.

We demonstrated the palpability of this injury in two ways. *First*, we showed that the deliberate dilution of Republican votes more likely than not changed the outcome of the elections in 2012, 2014, and 2016—precisely as Governor O'Malley and other state officials intended. According to two metrics that analyze precinct-by-precinct voter history, there was a 99.7%-100% chance that the Republican candidate would win the race for Congress in 2010. See Dkt. 191, at 7-9; *supra*, pp. 12-13. According to the same metrics, the massive swap of Republican voters for Democratic voters in the 2011 redistricting reversed the probabilities, making it 92.5%-94.0% likely that a *Democrat* would win in 2012. *Ibid.* This change in

the probabilities was a consequence of the redrawing of the Sixth District's lines alone.

The electoral outcomes were, moreover, exactly as predicted: Whereas Republican Roscoe Bartlett won the election by greater than a 28% margin in 2010, he lost to Democrat John Delaney by a whopping 21% margin in 2012. Dkt. 104 ¶¶ 54. Delaney won reelection in both 2014 and 2016. *Id.* at ¶¶ 55-56. In other words, *the gerrymander worked.*

Second, we showed that the dramatic dilution of Republican votes in the Sixth District has concretely suppressed political participation. See *Zherka* v. *Amicone*, 634 F.3d 642, 644-646 (2d Cir. 2011) (a plaintiff may satisfy the injury element of a First Amendment retaliation claim with proof of "actual chilling"). As one Democratic lawmaker put it at the time, the 2011 gerrymander "was drawn with one thing in mind": to "minimize the voice of the Republicans" in the former Sixth District. Dkt. 177-41, at 16.

That is just what happened. Turnout for the Republican primary elections in midterm years dropped by about one-third between 2010 and 2014 in the counties comprising the old Sixth District. See Dkt. 191-11. As plaintiff Sharon Strine testified, when she canvassed for the Republican candidate in 2014, voters told her "it's not worth voting anymore," because they "feel disenfranchised" by the gerrymander. Dkt. 177-53, at 61:2-64:2.

The gerrymander thus accomplished precisely what it was intended to accomplish: It is more likely than not that the gerrymander changed the outcome of the congressional elections in the Sixth District from 2012 forward and that it has suppressed political engagement, "minimiz[ing] the voice of the

Republicans" in the district. Dkt. 177-41, at 16. There is, in the end, no "skirt[ing] around the obvious—that the Democrats set out to flip the Sixth District; that they made massive shifts in voter population based on registration and voting records to accomplish their goal; and that they succeeded." App., *infra*, 39a (Niemeyer, J., dissenting).

3. Finally, the record shows that the lines of the Sixth District would not have been drawn to dilute Republican votes so fundamentally absent the specific intent to burden voters in the Sixth District for their past support for Congressman Bartlett. The principal alternative justification offered by the State for the Sixth District's southward dive into suburban Potomac—respect for the I-270 corridor as a community of interest—was neither supported by the evidence nor actually considered by anyone involved in the mapdrawing. See *supra*, p. 14.

In sum, for all of the reasons given in our briefs below (Dkts. 177-1, 191) and by Judge Niemeyer in his dissent (app., *infra* 34a-79a), the preliminary injunction should have been granted.

II. THE MAJORITY'S CONTRARY DECISION IS THE PRODUCT OF TWO LEGAL ERRORS

On its way to denying plaintiffs' motion, the majority not only ignored the evidence, but it committed two principal legal errors: It misunderstood the nature of plaintiffs' injury and refused to apply the *Mt. Healthy* burden-shifting framework. Each error requires reversal.

A. The majority misunderstood the nature of plaintiffs' injury

We begin with the majority's most fundamental error: its mistaken belief that plaintiffs' injury in-

heres in the Republican candidates' electoral losses, rather than the vote dilution that ensured those losses. On the basis of that misimpression, the majority held that, to establish a concrete injury, plaintiffs must prove that the 2011 gerrymander changed the outcome of every election held under the 2011 map. The court therefore faulted plaintiffs for (in its view) failing to prove that the Democratic victories in 2012, 2014, and 2016 were necessarily attributable to the gerrymander rather than the unseen "forces present in every election." App., *infra*, 17a.

Setting aside that plaintiffs *did* show that the post-gerrymander Democratic victories are a but-for consequence of the changes in the Sixth District's lines (see *supra*, pp. 12-13), that majority was simply wrong about the nature of the alleged burden. As Judge Niemeyer explained, plaintiffs' injury consists in "the adverse impact of [vote] dilution" and "the corresponding burdening of expression," not in particular "election[] results." App., *infra*, 75a.

1. The injury visited by a partisan gerrymander, according to this Court's precedents, is "interference with an opportunity to elect a representative of one's choice" (*Davis* v. *Bandemer*, 478 U.S. 109, 133 (1986) (plurality opinion)) or—said another way—the denial of citizens' opportunity for "an equally effective voice in the election" of a representative (*Reynolds* v. *Sims*, 377 U.S. 533, 565 (1964)). As a practical matter, this injury "takes the form of *vote dilution*." App., *infra*, 104a. See *Vieth*, 541 U.S. at 271 n.1 (plurality opinion) (district lines can be drawn to "give one political party an unfair advantage by diluting the opposition's voting strength"). Thus, this Court has explained, using targeted line-drawing to "[d]ilut[e] the weight of votes" of particular citizens "impairs"

those citizens' right to an "opportunity for equal participation * * * in the election" of their representatives, violating the constitution. *Reynolds*, 377 U.S. at 566.

That said, it is not enough for a plaintiff to show just "*any* interference with an opportunity to elect a representative of one's choice." *Bandemer*, 478 U.S. at 133 (plurality opinion) (emphasis added). Something "more than a *de minimis* effect" is required. *Id.* at 134. That is, of course, true in all cases under the First Amendment retaliation doctrine, which never protects against mere "*de minimis* injuries." *Shero* v. *City of Grove*, 510 F.3d 1196, 1204 (10th Cir. 2007). See also, *e.g.*, *Gill* v. *Pidlypchak*, 389 F.3d 379, 381 (2d Cir. 2004) (retaliation that is "*de minimis*" falls "outside the ambit of constitutional protection"). The interference with plaintiffs' opportunity to participate in the election of their representative must therefore amount to the kind of "demonstrable and concrete adverse effect" required in all First Amendment retaliation cases. App., *infra*, 106a. Accord, *e.g.*, *Zherka*, 634 F.3d at 646 (First Amendment retaliation requires that a "concrete harm [be] alleged and specified").

2. Putting this point into practice, the majority took the position that, to show palpable vote dilution (which is to say a gerrymandering injury that is more than *de minimis*), plaintiffs must prove that the 2011 gerrymander single-handedly "flipped the Sixth District" in each election in 2012, 2014, and 2016, "and, more importantly, that [the gerrymander] will continue to control the electoral outcomes in [the] district" in all future elections until a new map is drawn. App., *infra*, 17a. According to the majority, in other words, the dilution of plaintiffs' votes is a

concrete injury "if but only if" the outcomes of every election between 2012 and 2020 are necessarily "attributable to gerrymandering." *Id.* at 24a-25a.

That bizarre and draconian requirement finds no support in either the law or common sense. To be sure, in proving that the vote dilution inflicted upon plaintiffs is not *de minimis* or abstract, electoral outcomes are "relevant evidence of the extent of the injury." App., *infra*, 68a. And as we have said all along, the intentional dilution of plaintiffs' votes amounts to a concrete injury in this case *because* it has dictated the outcome of the elections in 2012, 2014, and 2016, precisely as intended. But it does not follow that, to establish a cognizable injury in a First Amendment retaliation challenge to a partisan gerrymander, a plaintiff must show that each and every electoral outcome is (and will continue to be) singularly attributable to the gerrymander. According to the majority's contrary view, a gerrymander that dictates two electoral outcomes among three elections would inflict too minor a burden upon citizens' representational rights to be actionable under the First Amendment. That makes no sense.

The majority's change-every-election standard also lacks support in this Court's cases. It is settled, for example, that a State may not use its authority to regulate elections under Article I of the Federal Constitution to attempt "to dictate electoral outcomes, [or] to favor or disfavor a class of candidates." *U.S. Term Limits, Inc.* v. *Thornton*, 514 U.S. 779, 833-834 (1995). Thus, in *Cook* v. *Gralike*, 531 U.S. 510 (2001), the Court invalidated a Missouri law that placed a notation next to each candidate's name on the ballot, relaying the candidate's position on term limits. *Id.* at 514-527. Although "the precise damage

the labels may exact on candidates [was] disputed between the parties" in that case, the Court did not hesitate to invalidate the regulation because "the labels surely place their targets at a political disadvantage." *Id.* at 525. Recognizing that "political disadvantage" was a cognizable injury in itself, the Court tellingly did not require the plaintiffs to prove that the regulation would have changed the outcome of the election as a precondition to relief.

Nor must a racial gerrymandering plaintiff show that a racial gerrymander changed the outcome of an election in order to obtain relief. Quite the opposite, the Court has said that "loss of political power through vote dilution is distinct from the mere inability to win a particular election." *Thornburg* v. *Gingles*, 478 U.S. 30, 57 (1986). Similarly, in *League of United Latin American Citizens* v. *Perry*, 548 U.S. 399 (2006), the Court held that a congressional district may qualify as a minority "opportunity" district for purposes of Section 2 of the Voting Rights Act (and that minority individuals might therefore suffer unlawful vote dilution) even if the minority group had *not* won the most recent elections. *Id.* at 428. That is to say, a Section 2 plaintiff need not show changed election outcomes in order to obtain relief under the Voting Rights Act. That same reasoning applies here.

3. Measured against proper standards, plaintiffs have proved palpable vote dilution that has worked a more-than-*de-minimis* burden on their representational rights. To begin, the gerrymander *did* dictate the outcomes of the 2012, 2014, and 2016 elections (see App., *infra*, 52a-53a, 69a), which is more than

enough to show concrete injury.[2] But even if they had not, there is no doubt that the cracking of the Republican majority in the Sixth District placed Republicans at a real "political disadvantage" (*Gralike*, 531 U.S. at 525) vis-à-vis the status quo ante. How else to interpret "the earthquake upheaval in the political landscape of the Sixth District" (App., *infra*, 39a), with metrics showing that between 2010 and 2012, the district changed from a near-certain Republican win to a near-certain Democratic win? Add to that the concrete depression of political participation that resulted in the years that followed, and there can be no doubt that the injury inflicted by the 2011 gerrymander was more than *de miminis*.[3]

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[2] State-certified election returns show that voters in the counties removed from the Sixth District continued to vote overwhelmingly for Republican candidates for office in 2012, 2014, and 2016. In Carroll County in 2012, for example, a combined total of 66% of the vote went to the two Republican candidates for Congress (the county is divided between the First and Eighth Districts), while just 27% went to the two Democrat candidates. See perma.cc/27EW-36AY. For similar results in other counties in 2012, see perma.cc/7VE8-US75.

[3] Concluding otherwise, the majority appears to have applied the Fourth Circuit's elevated standard for likelihood of success on the merits. See *Real Truth About Obama, Inc.* v. *FEC*, 575 F.3d 342, 351 (4th Cir. 2009) (requiring "a *clear showing* that [the movant] is likely to succeed at trial on the merits"), vacated on unrelated grounds 130 S. Ct. 2371 (2010). "Circuit courts are split on the question" whether—following this Court's decision in *Winter* v. *Natural Resources Defense Council*, 555 U.S. 7 (2008)—a lower standard remains appropriate. *Allstate Ins. Co.* v. *Warns*, 2012 WL 681792, at *13 n.5 (D. Md. 2012). See *Citigroup Global Mkts., Inc.* v. *VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 35-36 & n.5 (2d Cir. 2010); *Feldman* v. *Arizona Sec'y of State*, 843 F.3d 366 (9th Cir. 2016).

B. The majority erroneously placed the burden on plaintiffs to prove but-for causation

The majority's mistaken view that plaintiffs' injury takes the form of particular electoral losses rather than vote dilution led the panel to a second legal error: It declined to apply the burden-shifting framework of *Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274 (1977).

The causation necessary to support a First Amendment retaliation claim is "but-for causation, without which the adverse action would not have been taken." *Hartman* v. *Moore*, 547 U.S. 250, 260 (2006). This Court's cases generally provide that, "upon a prima facie showing of retaliatory harm, the burden shifts to the defendant official to demonstrate that even without the impetus to retaliate he would have taken the action complained of." *Ibid.* (citing *Mt. Healthy*, 429 U.S. at 287). In this way, "[t]he cases have * * * taken the evidence of the motive and [injury] as sufficient for a circumstantial demonstration that the one caused the other." *Ibid.*

Under *Mt. Healthy*, therefore, the burden is on defendants to prove the positive (there *was* an alternate, lawful explanation for the challenged action) rather than on plaintiffs to prove the negative (there was *no* alternate, lawful explanation). This makes sense, for it is the defendants who know better (and are better situated to prove) the causes of their own conduct and the effects that they produce.

The majority below nevertheless refused to apply the *Mt. Healthy* burden-shifting framework to plaintiffs' First Amendment retaliation claim in this case. Starting from the erroneous premise that "the government's 'action' is only 'injurious' if it actually alters the outcome of an election," the majority

reasoned that, "if an election result is not engineered through a gerrymander but is instead the result of neutral forces and voter choice, then no injury has occurred." App., *infra*, 24a. Thus, by the majority's lights, applying *Mt. Healthy* would in effect relieve plaintiffs of their burden to prove injury as well as causation. *Ibid.*

There are two problems with that conclusion. First—as we have just explained—plaintiffs' injury is not the Republicans' electoral losses in 2012 onward, but the vote dilution that followed as the intended and inevitable consequence of completely reconfiguring the district's lines (and that ultimately made those losses likely). Plaintiffs entered powerful direct evidence of just such injury (see App., *infra*, 41a-43a, 52a-53a, 69a-70a), including the huge shifts in the Cook Partisan Voter Index and Democratic Performance Index—the reliability of which went unchallenged by the State. The question under *Mt. Healthy*, though, is a different one: whether the State bears the burden of proving that it had some other legitimate and independently sufficient reason for drawing the lines of the Sixth District as it did.

Apart from misunderstanding plaintiffs' injury, the majority's rationale with respect to *Mt. Healthy* rests on "a bizarre notion of causation that requires the exclusion of all possible alternative explanations, however remote and speculative," which in practice required the majority to dismiss as insufficient plaintiffs' "extraordinarily strong [affirmative] evidence of the connection between intent and effect." App., *infra*, 34a (Niemeyer, J., dissenting). That makes little practical sense. Indeed, "applying a causation standard that seeks to eliminate all possible but unproved factors, however remote and speculative,"

Judge Niemeyer concluded, "is directly contrary to the causation standard that the Supreme Court has established for retaliation claims." *Id.* at 77a.

Plaintiffs having proved (1) that state officials specifically intended to dilute Republicans' votes because of their past support for Roscoe Bartlett and (2) that they succeeded in diluting those votes in a manner that produced an actual injury to plaintiffs' representational rights, the burden should have shifted to the State to prove that the massive reconfiguration of the Sixth District—and all the attending consequences—would have happened regardless, a burden that it did not meet. The majority was wrong to hold otherwise.

III. THE COURT SHOULD ORDER EXPEDITED BRIEFING AND ARGUMENT

This appeal presents several substantial questions of fundamental national importance that warrant full briefing and argument. Cf. *McCutcheon*, 134 S. Ct. at 1447 (following a three-judge district court's denial of a preliminary injunction, holding that "[a]ppellants' substantial First Amendment challenge * * * merits [our] plenary consideration"). In addition to the questions presented in this brief, over which the judges below were deeply divided, this appeal presents an opportunity for the Court to consider more broadly the viability of the First Amendment retaliation doctrine as a solution to the problem of partisan gerrymandering.

As we explain in greater detail in the motion for expedited consideration also filed today, the Court should establish a sufficiently expedited briefing schedule to permit oral argument in November of this year.

Expedited consideration is warranted for the reasons that a motion for a preliminary injunction was necessitated in the first place. As we explained in proceedings below (Dkt. 191, at 20 n.12) a map could be adopted in time for the 2018 primaries following remand from this Court. But expedited treatment is important to avoid the risk of denial of relief by default. To order plenary review in the ordinary course—or worse, to hold this case pending disposition of *Gill*—would risk effectively affirming the denial of the preliminary injunction by mere passage of time, without substantive review of the very serious questions presented here. That would be particularly problematic given the majority's express request for this Court's guidance before "charging ahead" with further discovery and trial. App., *infra*, 29a-33a.

Wholly apart from the need for speedy action in light of the forthcoming election, this Court has before it an appeal in *Gill* v. *Whitford*, No. 16-1161, which presents issues that dovetail with those raised in this appeal. The complementary theories pressed in the two cases counsels in favor of considering them in parallel rather than separately:

- *Gill* involves a challenge under the Equal Protection Clause based on the statewide concept of partisan asymmetry. This case, in contrast, involves a challenge strictly under the First Amendment retaliation doctrine.
- The *Gill* plaintiffs' case involves a challenge to a statewide map, and the State's principal arguments on appeal are directed at the statewide nature of the claim. This case, in contrast, involves a challenge to the gerrymander of a single congressional district.

- Whereas the concept of partisan asymmetry necessarily entails quantitative, statistically based linedrawing, the First Amendment retaliation doctrine does not. Any injury that is more than *de minimis* suffices.

While both this case and *Gill* are each separately worthy of plenary appellate review, the two cases considered together would present the Court with a broader spectrum and more substantial record upon which to consider the issues inherent in partisan gerrymandering challenges. That is especially so because underlying both cases is the question of justiciability, consideration of which assuredly would be enhanced by parallel review of multiple theories and standards of decision at once. Indeed, consideration of *Gill* on its own, uninformed by full briefing of the merits in this case, could lead the Court to inadvertently overlook points or make statements that confuse the law or foreclose meritorious claims.

This Court has previously found it appropriate to expedite review to permit parallel consideration of related cases. For example, the Court granted certiorari before judgment and expedited proceedings in *Gratz* v. *Bollinger*, 539 U.S. 244 (2003) to permit "consideration of race in university admissions in a wider range of circumstances" alongside *Grutter* v. *Bollinger*, 539 U.S. 306 (2003). The same treatment is warranted here, for which reason the Court may wish to set argument in the two cases for the same date.

For all of the reasons stated in the motion for expedited consideration filed herewith, the Court should note probable jurisdiction and order expedited merits briefing, in time for oral argument in early November. Thereafter, it should reverse.

CONCLUSION

The Court should note probable jurisdiction, order expedited briefing and argument, and reverse.

Respectfully submitted.

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APPENDICES

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

THREE-JUDGE COURT

O. JOHN BENISEK, *et al.*,
Plaintiffs
v.
LINDA H. LAMONE, *et al.*,
Defendants
Civil No. 13-cv-3233

MEMORANDUM

Before NIEMEYER, *Circuit Judge*, and BREDAR and RUSSELL, *District Judges*.

BREDAR, *District Judge*. On May 31, 2017, Plaintiffs O. John Benisek, *et al.* ("Plaintiffs") filed a Rule 65(a) Motion for a Preliminary Injunction and to Advance and Consolidate the Trial on the Merits or, in the Alternative, for Summary Judgment. (ECF No. 177.) The State responded on June 30, 2017, with a Cross-Motion for Summary Judgment. (ECF No. 186.) Both motions have been briefed. On June 28, 2017, this three-judge Court set in a hearing on Plaintiffs' preliminary injunction motion. On its own motion, the Court directed the parties to also address whether further proceedings in this case should be stayed pending the Supreme Court's decision in *Gill v. Whitford*, No. 16-1161, a political gerrymandering

case set to be argued in the forthcoming Term. A hearing on both matters was held on July 14, 2017.[1]

For the reasons explained below, the Court now DENIES Plaintiffs' preliminary injunction motion and STAYS this case pending the outcome of *Whitford*. As set forth in Part II.B, Judge Bredar concludes that such action is necessary because the justiciability of political gerrymandering claims remains in doubt, but the Supreme Court will likely resolve or clarify this threshold jurisdictional matter in its *Whitford* decision. As set forth in Part II.C, Judges Bredar and Russell conclude that Plaintiffs have not made an adequate preliminary showing that they will *likely* prevail on the causation element of their First Amendment retaliation claim. While the Court by no means excludes the possibility that Plaintiffs may ultimately prevail, Plaintiffs have not demonstrated that they are entitled to the extraordinary (and, in this case, extraordinarily consequential) remedy of preliminary injunctive relief. A stay pending further guidance in *Whitford* is appropriate at this juncture.

As set forth in his dissenting opinion, Judge Niemeyer would grant Plaintiffs' motion for preliminary injunctive relief.

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[1] In a pre-hearing scheduling order, the Court made clear that the *only* matters it would take up at the July 14 hearing were Plaintiffs' motion for preliminary injunctive relief and the Court's *sua sponte* request for argument on the propriety of a stay. (ECF No. 190.) The Court did not then, and does not now, rule on the pending cross-motions for summary judgment. Nor has the Court advanced the trial on the merits under Rule 65(a)(2).

I. Procedural History

A review of the recent history of this redistricting case may prove helpful. Following a remand from the Supreme Court on a procedural issue, *see Shapiro v. McManus* (*Shapiro I*), 136 S. Ct. 450 (2015), the case was assigned to a three-judge panel composed of Circuit Judge Niemeyer and District Judges Bredar and Russell. (ECF No. 42.) On March 3, 2016, Plaintiffs filed a Second Amended Complaint challenging Maryland's 2011 congressional districting map as an unconstitutional political gerrymander. (ECF No. 44.) The State moved to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. (ECF No. 51.)

On August 24, 2016, the Court denied the State's motion to dismiss in a 2–1 decision, with Judge Bredar dissenting. *See Shapiro v. McManus* (*Shapiro II*), 203 F. Supp. 3d 579 (D. Md. 2016). In its ruling, the panel majority held that Plaintiffs' Second Amended Complaint stated a justiciable claim for relief. The majority went on to endorse a standard for assessing political gerrymandering claims under the First Amendment:

> When applying First Amendment jurisprudence to redistricting, we conclude that, to state a claim, the plaintiff must allege that those responsible for the map redrew the lines of his district with the *specific intent* to impose a burden on him and similarly situated citizens because of how they voted or the political party with which they were affiliated. In the context of redistricting, this burden is the *injury* that usually takes the form of *vote dilution*. . .. [T]o establish the injury element of a retaliation claim, the plaintiff

> must show that the challenged map diluted the votes of the targeted citizens to such a degree that it resulted in a tangible and concrete adverse effect. . . . Finally, the plaintiff must allege *causation*—that, absent the mapmakers' intent to burden a particular group of voters by reason of their views, the concrete adverse impact would not have occurred.
>
> When a plaintiff adequately alleges the three elements of intent, injury, and causation . . . he states a plausible claim that a redistricting map violates the First Amendment and Article I, § 2. Of course . . . the State can still avoid liability by showing that its redistricting legislation was narrowly tailored to achieve a compelling government interest.

Id. at 596–97.[2]

Following the Court's decision at the pleading stage, the parties entered a contentious period of discovery, which resulted in voluminous procedural rulings that need not be reviewed here. At the conclu-

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[2] Judge Bredar disagreed that Plaintiffs had identified a workable standard because (1) "the Supreme Court has expressed some degree of tolerance for partisanship in the districting context, but that tolerance creates intractable line-drawing problems"; and (2) courts are ill-equipped to "ascertain those unusual circumstances in which redistricting inflicts an actual, measurable burden on voters' representational rights," yet that is "precisely what the Supreme Court has required." *Shapiro II*, 203 F. Supp. 3d at 601 (Bredar, J., dissenting). Ultimately, Judge Bredar concluded, there is no reliable, administrable standard for "distinguishing electoral outcomes achieved through political gerrymandering from electoral outcomes determined by the natural ebb and flow of politics." *Id.* at 606.

sion of this discovery period, the parties filed their pending motions. (ECF Nos. 177, 186.)

As explained more fully in Part II, the Court concludes that preliminary injunctive relief is inappropriate at this stage because Plaintiffs have not shown that they can likely prevail on each of the three elements of their First Amendment claim. Moreover, any further proceedings—whether in relation to the pending cross-motions for summary judgment or at a bench trial—would be premature because the Supreme Court is poised to consider issues that go to the heart of Plaintiffs' gerrymandering case. Until the Supreme Court speaks, prudence compels this Court to stay further proceedings.

II. Analysis

A. Standard of Decision

1. Preliminary Injunction

Plaintiffs seek preliminary injunctive relief in the form of an order barring the State from enforcing the 2011 redistricting plan and requiring the State to implement a new map in advance of the 2018 midterm elections. To prevail on their motion for such relief, Plaintiffs must show (1) that they are likely to succeed on the merits of their political gerrymandering claim, (2) that they will likely suffer irreparable harm in the absence of preliminary relief, (3) that the balance of equities tips in their favor, and (4) that an injunction would serve the public interest. *WV Ass'n of Club Owners & Fraternal Servs., Inc. v. Musgrave*, 553 F.3d 292, 298 (4th Cir. 2009) (citing *Winter v. NRDC*, 555 U.S. 7, 20 (2008)). "A preliminary injunction is an 'extraordinary remed[y] involving the exercise of very far-reaching power' and is 'to be granted only sparingly and in limited circum-

stances.'" *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554, 588 (4th Cir. 2017) (alteration in original) (quoting *MicroStrategy Inc. v. Motorola, Inc.*, 245 F.3d 335, 339 (4th Cir. 2001)), *cert. granted*, 137 S. Ct. 2080 (2017).

Rule 52(a)(2) of the Federal Rules of Civil Procedure provides that in "granting or refusing an interlocutory injunction, the court must . . . state the findings and conclusions that support its action." *See Greenhill v. Clarke*, 672 F. App'x 259, 260 (4th Cir. 2016) (per curiam) ("Rule 52(a)(2) . . . requires that the district court make particularized findings of fact supporting its decision to grant or deny a preliminary injunction; such findings are necessary in order for an appellate court to conduct meaningful appellate review."); *accord Booker v. Timmons*, 644 F. App'x 219 (4th Cir. 2016) (mem.). Because Judge Bredar's discussion in Part II.B, concerning justiciability, involves a pure question of law, no findings are enumerated in that Part. However, the opinion of the Court in Part II.C, concerning the causation element of Plaintiffs' First Amendment theory, includes findings germane to that issue as well as separately stated conclusions of law. Such findings and conclusions are, given the procedural posture of this case, preliminary, and they will not bind the Court in any future proceedings. *See Blake v. Balt. Cty.*, 662 F. Supp. 2d 417, 421 (D. Md. 2009) (citing *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981)).

2. Stay of Proceedings

The Supreme Court has long recognized that the "power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v.*

N. Am. Co., 299 U.S. 248, 254 (1936); *see also Williford v. Armstrong World Indus., Inc.*, 715 F.2d 124, 127 (4th Cir. 1983) (recognizing that courts enjoy the inherent authority to grant a stay "under their general equity powers and in the efficient management of their dockets"). The decision to stay an action "calls for the exercise of judgment, which must weigh competing interests and maintain an even balance." *Landis*, 299 U.S. at 254–55; *see also Rogler v. Fotos*, Civ. No. WDQ-14-228, 2015 WL 7253688, at *13 (D. Md. Nov. 17, 2015), *aff'd*, 668 F. App'x 462 (4th Cir. 2016) (mem.); *Cutonilli v. Maryland*, Civ. No. JKB-15-629, 2015 WL 5719572, at *4 (D. Md. Sept. 28, 2015), *appeal dismissed*, 633 F. App'x 839 (4th Cir. 2016) (mem.).

In deciding whether to stay proceedings, a court should consider the likely impact of a stay on each party as well as the "judicial resources that would be saved by avoiding duplicative litigation if the case is in fact stayed." *Mitchell v. Lonza Walkersville, Inc.*, Civ. No. RDB-12-3787, 2013 WL 3776951, at *2 (D. Md. July 17, 2013) (citing *Yearwood v. Johnson & Johnson, Inc.*, Civ. No. RDB-12-1374, 2012 WL 2520865, at *3 (D. Md. June 27, 2012)).

B. Justiciability

At the pleading stage in *Shapiro II*, the panel majority recognized "the justiciability of a claim challenging redistricting under the First Amendment and Article I, § 2, when it alleges intent, injury, and causation." 203 F. Supp. 3d at 598. Judge Bredar disagreed, writing that because (1) Plaintiffs had "not shown that their framework would reliably identify those circumstances in which voters' representational rights have been impermissibly burdened" and (2) no "acceptable alternative framework"

had been identified, Plaintiffs' claim must be treated as nonjusticiable. *Id.* at 601–02 (Bredar, J., dissenting). Despite the disagreement among the members of the panel on this threshold issue, the majority opinion remains the law of the case absent reconsideration by at least two judges or intervention by the Supreme Court. This Memorandum does nothing to unsettle that prior decision.

However, this case has long since passed the pleading stage. Plaintiffs now seek preliminary injunctive relief in the form of an order that, if entered, would cause an unprecedented disruption in Maryland's legislative and districting process. In granting such relief, the Court would enjoin enforcement of a map that was duly enacted by the General Assembly of Maryland, *see* Md. Code Ann., Elec. Law §§ 8-701 *et seq.*, and that survived a voter referendum by a wide margin. The remedy would require emergency action by the legislature. The time and resources necessary to implement a new map would surely have the effect of scuttling other legislative priorities in advance of the 2018 session. The remedy would be highly consequential.

In the arena of legislative and congressional districting, unelected federal judges should exercise great caution before declaring unconstitutional the work product of the people's elected representatives. *Cf. Davis v. Bandemer*, 478 U.S. 109, 145 (1986) (O'Connor, J., concurring in the judgment) ("The opportunity to control the drawing of electoral boundaries through the legislative process of apportionment is a critical and traditional part of politics in the United States, and one that plays no small role in fostering active participation in the political parties at every level. Thus, the legislative business of ap-

portionment is fundamentally a political affair, and challenges to the manner in which an apportionment has been carried out . . . present a political question in the truest sense of the term.").

The preliminary injunction mechanism under Rule 65(a) of the Federal Rules of Civil Procedure does not authorize a federal court to grant such an extraordinary remedy haphazardly. Rather, the court must be confident, among other things, that the plaintiff has shown it is likely to prevail on the merits of its claim. *Winter*, 555 U.S. at 20. That assessment is quite different from the plaintiff-friendly evaluation of the pleadings under Rule 12(b)(6) and the Supreme Court's decisions in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). A court that has made a preliminary legal determination in the plaintiff's favor must decide at the Rule 65(a) stage whether the plaintiff has carried its burden to show it will likely succeed on the merits. Intervening developments in the law and, in particular, signals from appellate courts, must inform this analysis.

In this case, an intervening development casts a cloud over the panel majority's prior ruling as to the justiciability of Plaintiffs' political gerrymandering claim. On June 19, 2017, the Supreme Court agreed to hear argument in *Gill v. Whitford*, No. 16-1161, a direct appeal from a decision by a three-judge panel that enjoined a Wisconsin legislative map as an unconstitutional political gerrymander. Argument is calendared for October 3, 2017. The decision below in *Whitford v. Gill*, 218 F. Supp. 3d 837 (W.D. Wis. 2016), is fairly remarkable in that it is the first district court opinion since the Supreme Court's splintered ruling in *Vieth v. Jubelirer*, 541 U.S. 267

(2004), to (1) endorse a standard for adjudicating political gerrymandering claims, (2) apply that standard to rule in the plaintiff's favor, and then (3) order the state to draw a new map.[3]

In a 5–4 order, the Supreme Court stayed the district court's judgment pending disposition of the appeal. The Court declined to note probable jurisdiction, ordering instead that "[f]urther consideration of the question of jurisdiction is postponed to the hearing of the case on the merits." Plaintiffs in this case brush aside the justiciability question in *Whitford* as the "last of the five questions presented" in that appeal (ECF No. 193 at 2), and the dissent makes no mention of *Whitford*. Yet the Supreme Court's decision to hold over the jurisdictional question for argument is a strong signal that the question remains unsettled in the minds of the Justices.

That should come as no surprise. The justiciability of political gerrymandering claims has plagued the Court for decades. As the panel majority observed in *Shapiro II*, six Justices acknowledged in *Bandemer* that such claims are theoretically justiciable, 478 U.S. at 125, but the Court fractured on the standard for adjudicating these claims. Conversely, Chief Justice Burger and Justices O'Connor and Rehnquist would have held that political gerrymandering claims "raise a nonjusticiable political question that the judiciary should leave to the legislative branch as the Framers of the Constitution unquestionably intended." *Id.* at 144 (O'Connor, J., concurring in the judgment).

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[3] The *Whitford* panel addressed the remedy separately in an unpublished opinion, *see Whitford v. Gill*, No. 15-cv-421-bbc, 2017 WL 383360 (W.D. Wis. Jan. 27, 2017).

Eighteen years later, the Court revisited the question in *Vieth*, where four Justices (Chief Justice Rehnquist and Justices Scalia, O'Connor, and Thomas) would have held "that political gerrymandering claims are nonjusticiable and that *Bandemer* was wrongly decided." 541 U.S. at 281. Justice Kennedy, the swing vote, declined to sign on to the plurality opinion that would have overruled *Bandemer*, but he sounded sharp notes of caution, writing that there are "weighty arguments for holding cases like these to be nonjusticiable; and those arguments may prevail in the long run." *Id.* at 309 (Kennedy, J., concurring in the judgment); *see also id.* at 317 ("The failings of the many proposed standards for measuring the burden a gerrymander imposes on representational rights make our intervention improper.").

While the dissent in the instant case states that "five Justices in *Vieth* concluded that the [political gerrymandering] issue remained justiciable," *post*, at 44–45, Justice Kennedy's opinion was more guarded than that: it was so guarded, in fact, that the plurality characterized it as a "reluctant fifth vote *against* justiciability at district and statewide levels—a vote that may change in some future case but that holds, for the time being, that this matter is nonjusticiable." *Id.* at 305 (plurality opinion) (emphasis added); *see also* Michael S. Kang, *When Courts Won't Make Law: Partisan Gerrymandering and a Structural Approach to the Law of Democracy*, 68 Ohio St. L.J. 1097, 1111 (2007) ("Justice Kennedy's ambivalence leaves it bizarrely unclear where the law of partisan gerrymandering stands. The plurality in *Vieth*, as a result, argued that Justice Kennedy's vote ought to be understood effectively, if not expressly, as 'a reluctant fifth vote against justiciability.'" (footnotes omitted)). Hardly a resounding triumph for those who would

ask federal courts to adjudicate political gerrymandering disputes, *Vieth* was the last case in which the Court squarely confronted the question.[4]

The Supreme Court's willingness to consider and reconsider the justiciability question is understandable, given how fundamental that question is to the exercise (and even the legitimacy) of federal judicial power. Justiciability is a threshold matter that courts are required to evaluate, *sua sponte* if necessary, before reaching the merits of a case. "Justiciability concerns 'the power of the federal courts to entertain disputes, and . . . the wisdom of their doing so.'" *Republican Party of N.C. v. Martin*, 980 F.2d 943, 950 (4th Cir. 1992) (alteration in original) (quoting *Renne v. Geary*, 501 U.S. 312, 316 (1991)); *see also Hamilton v. Pallozzi*, 848 F.3d 614, 619 (4th Cir. 2017) ("Justiciability is an issue of subject-matter jurisdiction, and we have an independent obligation to evaluate our ability to hear a case before reaching the merits of an appeal."); *Proctor v. Prince George's Hosp. Ctr.*, 32 F. Supp. 2d 820, 824 (D. Md. 1998) ("It is appropriate for a district court to raise issues of justiciability *sua sponte*.").

Merely because the Supreme Court has agreed to hear argument in *Whitford* and has deferred the ju-

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[4] In *League of United Latin American Citizens (LULAC) v. Perry*, 548 U.S. 399, 414 (2006), a majority of Justices declined to address the question of justiciability. Chief Justice Roberts and Justice Alito stressed in a separate opinion that they took "no position on that question, which has divided the Court." *Id.* at 492–93 (Roberts, C.J., concurring in part, concurring in the judgment in part, and dissenting in part). Justices Scalia and Thomas reiterated their view that political gerrymandering claims are nonjusticiable. *Id.* at 512 (Scalia, J., concurring in the judgment in part and dissenting in part).

risdictional question, it does not necessarily follow that the Court will clear up the ambiguity next Term. The composition of the Court has changed dramatically since *Vieth*, as that case was decided before Chief Justice Roberts and Justices Alito, Sotomayor, Kagan, and Gorsuch took their seats. Nonetheless, it is conceivable that the Justices could again divide as the Court did in *Vieth*, with a majority declining to agree on a standard but with at least five votes for the proposition that some standard might yet exist. Or perhaps the Justices will endorse the standard recognized by the three-judge court in *Whitford*, or some other standard; or perhaps they will rule finally that federal courts may not adjudicate these types of political questions. It would be idle to speculate as to the outcome of a case that has yet to be heard.

But with due respect to the other members of this panel, it would be irresponsible to grant a drastic remedy on the basis of a claim that the Supreme Court may invalidate in a matter of months. We know now that the Court is poised to consider the justiciability question. Guidance of some sort (maybe dispositive guidance) is forthcoming. Accordingly, to suggest that Plaintiffs are likely to prevail on the merits of their claim and to award injunctive relief on that basis would place the cart far ahead of the horse.

This is particularly so in light of a case to which neither party has devoted much attention and which, once again, the dissent does not mention. That case is *Cooper v. Harris*, 137 S. Ct. 1455 (2017), a racial gerrymandering case decided late last Term. In a separate opinion, Justice Alito—joined by Chief Justice Roberts and, strikingly, Justice Kennedy—took a

dim view on the justiciability of political gerrymandering:

> We have repeatedly acknowledged the problem of distinguishing between racial and political motivations in the redistricting context. . . . As we have acknowledged, "[p]olitics and political considerations are inseparable from districting and apportionment," and it is well known that state legislative majorities very often attempt to gain an electoral advantage through that process. Partisan gerrymandering dates back to the founding, and while some might find it distasteful, "[o]ur prior decisions have made clear that a jurisdiction may engage in constitutional political gerrymandering . . .."

Id. at 1488 (Alito, J., concurring in the judgment in part and dissenting in part) (citations omitted). Justice Alito stressed that the Court's cases require "extraordinary caution" any time the state has "articulated a legitimate political explanation for its districting decision." *Id.* at 1504 (internal quotation marks and citation omitted). He added that "if a court mistakes a political gerrymander for a racial gerrymander, it *illegitimately invades* a traditional domain of state authority, usurping the role of a State's elected representatives." *Id.* at 1490 (emphasis added).

Justice Alito's remarks are non-majority dicta in a case involving a different (though analogous) claim. These remarks should not be treated as proof that any member of the Supreme Court has prejudged the issues on appeal in *Whitford*. *But see Crowe v. Bolduc*, 365 F.3d 86, 92 (1st Cir. 2004) ("[C]arefully considered statements of the Supreme Court, even if

technically dictum, must be accorded great weight and should be treated as authoritative." (citation omitted)); *Jordon v. Gilligan*, 500 F.2d 701, 707 (6th Cir. 1974) ("Even the Court's dicta is of persuasive precedential value."); *Fouts v. Md. Cas. Co.*, 30 F.2d 357, 359 (4th Cir. 1929) ("[C]ertainly dicta of the United States Supreme Court should be very persuasive."). However, these remarks are further evidence that the justiciability question is far from settled and will likely be a focal point at the October 2017 argument.

Nothing about this discussion should be taken to suggest that Judge Bredar has decided, as a matter of law, that political gerrymandering claims are nonjusticiable. Indeed, two members of this panel have already decided that such claims *are* justiciable pursuant to the First Amendment framework that Justice Kennedy contemplated in *Vieth*, and the Supreme Court has not—to date— overruled *Bandemer* or held that partisan gerrymandering presents a nonjusticiable political question. Nor has the Court rejected Justice Kennedy's First Amendment theory, though that theory remains nothing more (or less) than a "theory put forward by a Justice of th[e] Court and uncontradicted by the majority in any . . . cases," *Shapiro I*, 136 S. Ct. at 456.[5]

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[5] The dissent seems to suggest that political gerrymandering claims *must* be justiciable lest "unacceptable results" obtain, such as a "pointillistic" map that assigns voters to various districts "regardless of their geographical location." *Post*, at 28 (emphasis omitted). This case, of course, does not involve any such extreme practices. Whatever else might be said, Maryland's congressional districts generally adhere to traditional districting principles such as contiguity and the preservation of communities of interest. Should a state legislature ever attempt

The dissent simply is incorrect when it states that Judge Bredar advocates "judicial abdication from partisan gerrymandering cases," *post*, at 48. Far from it. A final decision by a majority of Justices instructing lower courts to apply a particular standard to resolve partisan gerrymandering claims would be a welcome development in the law. *See Shapiro II*, 203 F. Supp. 3d at 600 (Bredar, J., dissenting) ("This opinion is not a defense of the State's authority to segregate voters by political affiliation so as to achieve pure partisan ends: such conduct is noxious and has no place in a representative democracy."). The point of this discussion is not to suggest that political gerrymandering claims *are not* or *should not* be justiciable; rather, it is to call attention to the uncertainty in the law, an uncertainty that was amplified two months ago when the Court granted argument in *Whitford*. Pausing these proceedings to await further guidance from the Supreme Court is not abdication: it is an expression of prudence, judicial restraint, and respect for the role of a district court that must scrupulously adhere to the instructions of appellate authorities.

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to implement a pointillistic map, a reviewing court could simply establish a bright line rule requiring *some* degree of contiguity on the theory that pointillism subverts the framers' intentions as expressed in Article I, § 2. A rule barring pointillism would be easy to administer, would not require courts to predict voter behavior, and would not present the thorny line-drawing problems at issue in the typical political gerrymandering case. Pointillism would be the proverbial "easy case" in this context, and the Court would be fortunate indeed to be confronted with such a simple challenge. It is not, though, and we should not oversimplify the challenge of adjudicating the claim that is actually before us on the basis of a hypothetical that has little to do with that claim.

Because Plaintiffs are unable at this time to demonstrate that they will likely prevail on the threshold question of justiciability, and because the Supreme Court is poised to act and in so doing may change the legal landscape, Plaintiffs' preliminary injunction motion should be denied and their case stayed pending the Supreme Court's decision in *Whitford*.

C. Causation

1. Preliminary Injunction

Apart from any doubts as to justiciability, and assuming without deciding that Plaintiffs have adduced sufficient evidence to show that the State crafted the 2011 redistricting plan (and the Sixth District in particular) with the "specific intent to impose a burden" on Plaintiffs and similarly situated citizens through vote dilution, *Shapiro II*, 203 F. Supp. 3d at 596, it is unclear whether any such nefarious plan was and remains effective. This Court is not now persuaded that Plaintiffs will likely prove that "absent the mapmakers' intent to burden a particular group of voters by reason of their views, the concrete adverse impact would not have occurred." *Id.* at 597. Put more simply, the Court is not yet persuaded that it was the gerrymander (versus a host of forces present in every election) that flipped the Sixth District and, more importantly, that will continue to control the electoral outcomes in that district. Voter decisions are mutable and subject to change, despite voting history and party affiliation. As discussed below, the razor's-edge Sixth District race in 2014 is evidence that suggests significant party-crossover voting and calls into doubt whether the State engineered an *effective* gerrymander.

Trial testimony and other evidence, including thorough cross-examination, may yet establish that Plaintiffs have met their burden of proof with respect to causation, but the Court is not persuaded that they have done so now, at least not to the high standard set for the granting of preliminary injunctions. Since but-for causation is an element of Plaintiffs' First Amendment claim, it follows that if Plaintiffs are unable to prove this element, their claim will collapse on its merits. At this stage, the Court cannot say that it is *likely* that Plaintiffs will prevail on this element—only that they *might*. For that reason, the Court must deny Plaintiffs' request for the extraordinary remedy of preliminary injunctive relief.

a. Findings of Fact

Strictly for purposes of deciding whether to enter a preliminary injunction, the Court makes the following findings of fact, *see* Fed. R. Civ. P. 52(a)(2), corresponding to the causation element of Plaintiffs' First Amendment claim:

1. Maryland's 2011 redistricting process involved two parallel procedures: a public-facing procedure led by the Governor's Redistricting Advisory Committee and an internal procedure involving Maryland's congressional delegation and a consulting firm called NCEC Services, Inc. (ECF No. 177–4 at 36:4–13; ECF No. 177–5 ¶ 18.)
2. NCEC in turn designated analyst Eric Hawkins to review the State's redistricting plan and prepare sample maps using voter demographic data (including party affiliation and voting history) and a computer program called "Maptitude for Redistricting." (ECF No. 177–4 at 36:18–37:17.)

3. In performing his analysis, Hawkins relied on a proprietary metric called the Democratic Performance Index (DPI), a weighted average of candidate performance that takes account of voting history. (*Id.* at 24:5–19.) A higher DPI signals a greater statistical likelihood of Democratic candidate success based on past performance.

4. Hawkins created between ten and twenty draft maps. He analyzed six maps alongside proposals submitted by third parties. Each of the six maps would have produced a federal DPI of 52% or greater for the Sixth District, while the third-party submissions would have produced much lower DPIs. (*Id.* at 38:2– 9; ECF No. 177–34; ECF No. 177–35 at 31–32.)

5. There is no evidence that Hawkins personally created the final map that was enacted into law. (ECF No. 177–1 at 13 n.9; ECF No. 186–1 at 11.) Former governor Martin O'Malley testified that legislative director Joe Bryce and staff from the Maryland Department of Planning likely created the final document. (ECF No. 177–3 at 53:12–54:7.)

6. The map as enacted had the effect of transferring 360,368 Marylanders *out of* the Sixth District and 350,179 Marylanders *into* the Sixth District. (ECF No. 177–19 at 12.) In the process, 66,417 registered Republicans were removed from the district and 24,460 registered Democrats were added to the district. (*Id.* at 6.)

7. After the 2011 plan was implemented, a plurality (44.8%) of voters in the Sixth District

were registered Democrats, while 34.4% of voters were registered Republicans. 20.8% of voters were registered with neither major political party. (ECF No. 186–19 at 5–6.)

8. The "Cook Partisan Voting Index" promulgated by the *Cook Political Report* formerly rated the Sixth District as a safe Republican seat. As a consequence of the 2011 redistricting, the Sixth District is now rated as a "likely" Democratic seat. (ECF No. 177–52 at 8.)

9. In the 2012 congressional election (the first held in the new Sixth District), Democrat John Delaney defeated incumbent Republican congressman Roscoe Bartlett by a 20.9% margin. (ECF No. 177–5 ¶ 54.) However, in the U.S. Senate election conducted that same cycle, Democrat Ben Cardin carried the Sixth District by just 50% of the vote, despite winning 56% of the vote statewide. (ECF No. 186–19 at 10; ECF No. 186–42 PDF at 2.)

10. Congressman Delaney won reelection in 2014 and 2016 by margins of 1.5% and 14.4%, respectively. (ECF No. 177–5 ¶¶ 55–56.)

11. While Plaintiffs have produced expert reports predicting, based on party affiliation and other demographic data, that Democratic candidates will likely fare better under the 2011 plan than under the former plan, Plaintiffs have conducted no statistical sampling and have adduced no individual voter data showing how displaced and current residents of the Sixth District actually voted in 2012, 2014, and 2016.

12. Plaintiffs have not surveyed voters to determine (1) whether former supporters of Congressman Bartlett who remained in the Sixth District after the 2011 redistricting voted for Congressman Delaney instead, (2) whether such voters switched party affiliation or simply selected a different candidate on an *ad hoc* basis, and (3) the reasons underlying these voters' decisions. Nor have Plaintiffs amassed data concerning the voting behavior and preferences of former Sixth District residents who now reside in other congressional districts.

13. Congressman Bartlett underperformed the other seven members of Maryland's congressional delegation in fundraising leading up to his defeat in the 2012 election. (ECF No. 104–13 at 2/2.)

14. In 2014, Republican challenger Dan Bongino nearly unseated Congressman Delaney even though Bongino resided outside the Sixth District (ECF No. 186–20 at 18:15–20) and operated at a financial disadvantage vis-à-vis Delaney (*id.* at 36:21–37:10). Also in 2014, Republican gubernatorial candidate Larry Hogan won 56% of the vote in the Sixth District, besting his Democratic rival by 14 percentage points. (ECF No. 186–19 at 10.)

b. Conclusions of Law

In denying Plaintiffs' preliminary injunction motion, the Court reaches the following conclusions of law:

1. Under *Winter v. NRDC*, a plaintiff seeking preliminary injunctive relief must demonstrate that plaintiff is likely to prevail on the merits of its claim. 555 U.S. at 20.
2. In *Shapiro II*, this Court held that, to state a claim for First Amendment retaliation via gerrymandering, Plaintiffs must allege not only that the gerrymander diluted votes of targeted citizens "to such a degree that it resulted in a tangible and concrete adverse effect" but also that "absent the mapmakers' intent to burden a particular group of voters by reason of their views, the concrete adverse impact would not have occurred." 203 F. Supp. 3d at 597.
3. In other words, the First Amendment framework that the *Shapiro II* majority endorsed requires proof that *but for* the gerrymander, the challenged effect (here, the switch in political power in the Sixth District) would not have happened.
4. The dissent complains that "the majority's new First Amendment standard depends on an *election's results*, not on the adverse impact of dilution on the targeted voters." *Post*, at 59. In the dissent's view, "the adverse effect is *the dilution* of votes—and the corresponding burdening of expression by voters—regardless of how the election turned out." *Post*, at 59. However, the *Shapiro II* majority recognized that "vote dilution is a matter of degree, and a *de minimis* amount of vote dilution, even if intentionally imposed, may not result in a sufficiently adverse effect on the exercise of First Amend-

ment rights to constitute a cognizable injury." 203 F. Supp. 3d at 596–97. The dissent offers no yardstick to measure vote dilution that exceeds a "*de minimis* amount" yet falls short of altering electoral outcomes. Nor have Plaintiffs shown that they suffered any tangible First Amendment burden other than, perhaps, their inability to elect their preferred candidate. A political gerrymander that imposes nothing more than an abstract "burden" without actually affecting tangible voter rights or interests surely is not justiciable, even pursuant to the framework two judges endorsed in *Shapiro II*.

5. The dissent frets that "under the majority's new standard, no redistricting map could be challenged *before* an election." *Post*, at 60. To whatever extent this critique is accurate, it is a consequence of adjudicating political gerrymandering claims according to the standard adopted in *Shapiro II*. There may be some other, as-yet unidentified standard that would enable courts to enjoin implementation of a map prior to the first election conducted thereunder, but neither Plaintiffs nor the dissent have proffered any such workable standard here. Strictly prospective relief is relatively uncommon in the law, and courts are far more likely to be tasked with curing or vindicating a prior harm than with anticipating and forestalling a potential one.

6. Citing a handful of First Amendment cases that do not deal with election law, the dissent proposes to import into the political gerrymandering context the burden-shifting

framework of *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977). *Post*, at 56–57. The Court declines to do so, at least at this preliminary stage. As the dissent explains, *Mt. Healthy* stands for the proposition that "where the government takes an injurious action, an injured party need not show that the government would never have taken the same action anyway." *Post*, at 57. *Mt. Healthy* assumes an injury has occurred and focuses on questions of motive and intent. The problem is that in the redistricting context, the government's "action" is only "injurious" if it actually alters the outcome of an election (or otherwise works some tangible, measurable harm on the electorate). In other words, the question of but-for causation is closely linked to the very existence of an injury: if an election result is not engineered through a gerrymander but is instead the result of neutral forces and voter choice, then no injury has occurred.

7. For this reason, the dissent's poisoning hypothetical, *post*, at 60–61, is beside the point. If a victim sips poison, or trains collide, or an employee is fired, or a homeowner's request for a zoning variance is denied, there is no question that an injury of one sort or another has occurred. The question for courts to resolve in such cases is whether that injury was caused by some illicit action (or inaction) of the defendant and whether the defendant has an adequate defense to the charge. But if Roscoe Bartlett loses to John Delaney, voters are thereby injured if but only if that loss is

attributable to gerrymandering or some other constitutionally suspect activity. If the loss is instead a consequence of voter choice, that is not an *injury*. It is *democracy*.

8. But-for causation—not some metaphysical, could-be burden—is the standard that controls in this case, and Plaintiffs bear the burden to prove this element is satisfied. Assuming that Maryland's former congressional map provides an acceptable benchmark for assessing the 2011 map, this but-for causation requirement would be satisfied *only* if Roscoe Bartlett would have won reelection in 2012 had the prior map remained intact (with minor adjustments to account for demographic changes reflected by the 2010 Census). Plaintiffs admit as much: "[O]ur burden is to show that the purposeful dilution of Republican votes in the Sixth District was a but-for cause of the routing of Roscoe Bartlett in 2012 and of the Republican losses in 2014 and 2016." (ECF No. 191 at 13.)[6]

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[6] *But see Shapiro II*, 203 F. Supp. 3d at 606 (Bredar, J., dissenting) ("Because of the inherent mutability of political affiliation, the Court cannot simply compare the results of an election conducted pursuant to Map X with those of a subsequent election conducted pursuant to Map Y and blame any shift in power on redistricting: each election cycle is unique, and voter behavior is as unpredictable as the broader societal circumstances that may make one candidate, or one party, more appealing than the other to particular voters and communities. For that matter, treating a prior map as a baseline for measuring the constitutionality of a subsequent map assumes that the prior map was itself free of impermissible manipulation—yet we know, as a practical matter, that gerrymandering is widespread in our political system and as old as the Republic."); *LULAC*, 548 U.S. at

9. The fact that John Delaney defeated Roscoe Bartlett by an impressive 20.9% margin in 2012 may shed some light on the effectiveness of the alleged gerrymander. However, even a much smaller victory by Delaney would have shifted the Sixth District seat from Republican to Democratic control. The dispositive question is whether the shift would have occurred absent the alleged gerrymander—that is, whether Delaney would have prevailed (even if by a much smaller margin) absent the State's reliance on NCEC's DPI and demographic data.

10. Upon the record, the briefs, and the hearing, the Court cannot now conclude that the *likely* outcome of this litigation is a finding that, but for the alleged gerrymander, the Republican Party would have retained control of the Sixth District congressional seat. Plaintiffs have not produced voter sampling or statistical data, affidavits, or other evidence of a sufficient quantity to demonstrate *how* and *why* voters who would have been included in a neutrally drafted Sixth District voted in the 2012, 2014, and 2016 elections. Without such data, the Court cannot reverse-engineer those elections and is unprepared to assume, at this preliminary stage, that enough such voters would have voted for the Republican candidate so as to preserve Republican control.

11. While Plaintiffs have adduced some persuasive predictive evidence through the Cook

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446 (Kennedy, J.) ("There is no reason . . . why the old district has any special claim to fairness.").

Partisan Voting Index and expert reports and testimony, the Court is unconvinced, certainly by the standard governing the issuance of a preliminary injunction, that such evidence is determinative of but-for causation. In particular, the Court is not convinced that such predictive evidence accurately accounts for subjective factors such as evolving political temperament and the personal strengths or weaknesses of individual candidates. The surprising results of various elections in 2016 illustrate the limitations of even the most sophisticated predictive measures. Experience teaches that voter preferences are mutable and that American democracy is characterized by a degree of volatility and unpredictability. *See Bandemer*, 478 U.S. at 160 (O'Connor, J., concurring in the judgment) ("To allow district courts to strike down apportionment plans on the basis of their prognostications as to the outcome of future elections or future apportionments invites 'findings' on matters as to which neither judges nor anyone else can have any confidence.").

12. The Court is especially reluctant at this preliminary stage, absent more concrete voter data, to find an effective gerrymander given that Congressman Delaney nearly lost control of his seat in 2014 in a race against a candidate burdened with undisputed geographic and financial limitations.

13. Indeed, this recent near defeat raises serious doubts about whether Plaintiffs' alleged injury is likely to recur. The most relevant

question in a case involving a claim for solely injunctive relief is not whether a harm may have occurred in the past but whether the harm is presently occurring or very likely to recur. If the injury, if any, has long since concluded, there is nothing to enjoin. *See Bloodgood v. Garraghty*, 783 F.2d 470, 475 (4th Cir. 1986) ("An injunction is a drastic remedy and will not issue unless there is an imminent threat of illegal action. '[An i]njunction issues to prevent existing or presently threatened injuries. One will not be granted against something merely feared as liable to occur at some indefinite time in the future.'" (quoting *Connecticut v. Massachusetts*, 282 U.S. 660, 674 (1931))); *cf. Beck v. McDonald*, 848 F.3d 262, 277 (4th Cir. 2017) ("'[A]bsent a sufficient likelihood that [Plaintiffs] will again be wronged in a similar way' . . . past events, disconcerting as they may be, are not sufficient to confer standing to seek injunctive relief." (alteration in original) (citations omitted)); *Bryant v. Cheney*, 924 F.2d 525, 529 (4th Cir. 1991) ("The courts should be especially mindful of th[e] limited role [prescribed by Article III] when they are asked to award prospective equitable relief . . . for a concrete past harm, and a plaintiff's past injury does not necessarily confer standing upon him to enjoin the possibility of future injuries.").

14. Despite the Court's present doubt as to Plaintiffs' proof on the causation prong of their First Amendment claim, the Court does not hold that Plaintiffs *cannot* prevail on their claim. Any such holding would be every

bit as premature as the extraordinary relief that Plaintiffs have requested and that the dissent urges. The Court simply concludes that Plaintiffs have not carried their burden to show they are *likely* to prevail on the merits, and so preliminary injunctive relief is not proper.

15. The Court remains open to the possibility that the evidence Plaintiffs have adduced, when subject to robust cross-examination and the development that only a trial can bring, may satisfy Plaintiffs' burden of proof. The Court also is willing to entertain requests by either party to reopen discovery (subject to the stay discussed immediately below) to address the evidentiary gaps and deficits or potential deficits flagged in this Memorandum. Regardless whether either party seeks additional discovery, the parties may find it helpful to take account of the Court's discussion here in any future briefs or oral presentations.

2. Stay of Proceedings

The Court's concerns about Plaintiffs' proof with respect to the causation element of their First Amendment claim compel the Court not only to deny preliminary injunctive relief but also to stay proceedings pending the Supreme Court's further guidance in *Whitford*.

While Plaintiffs argue vociferously that "[t]his case and the Wisconsin case are fundamentally different" (ECF No. 193 at 4), this Court disagrees. Fundamentally, these cases are two sides of the same coin: both propose a standard by which federal courts might adjudicate claims of unlawful political

gerrymandering. Both cases invoke the First Amendment as a source of constitutional authority. And the standard that the Western District of Wisconsin has endorsed is remarkably similar to the standard endorsed by the majority in *Shapiro II*: "We conclude," the Wisconsin court wrote, "that the First Amendment and the Equal Protection clause prohibit a redistricting scheme which (1) is intended to place a severe impediment on the effectiveness of the votes of individual citizens on the basis of their political affiliation, (2) has that effect, and (3) cannot be justified on other, legitimate legislative grounds." *Whitford*, 218 F. Supp. 3d at 884.

True, the cases differ in their particulars. The Wisconsin case is a statewide challenge to state legislative districts, based in part on partisan asymmetry (the so-called "efficiency gap"); the Maryland case is a single-district challenge to a congressional district, grounded in a retaliation theory. For plaintiffs in either case to prevail, however, they would have to show that the gerrymander about which they complain actually inflicted a constitutional injury on them, one that is sufficiently personal so as to satisfy the threshold requirements of Article III and sufficiently definite and clear so as to justify the drastic remedy of an injunction against enforcement of an otherwise lawfully enacted map. In determining whether a constitutional injury has occurred, the court invariably must reach the question of causation, for if election outcomes (whether in a single district or across the state) arise not from political machinations at the statehouse but instead from neutral forces or the "natural ebb and flow of politics," *Shapiro II*, 203 F. Supp. 3d at 606 (Bredar, J., dissenting), no injury has occurred and no remedy may issue. While the Supreme Court's decision in

Whitford may not prove dispositive of *Benisek*, the Court's analysis undoubtedly will shed light on critical questions in this case, and the parties and the panel will be best served by awaiting that guidance.

D. Additional Practical Considerations Supporting the Decision to Stay Proceedings

Two practical considerations bolster the Court's conclusion that a stay is appropriate at this time.

First: this Court is in no position to award Plaintiffs the remedy they have requested on the timetable they have demanded. For the reasons explained in Part II.C, two members of this panel are unconvinced that Plaintiffs will *likely* prevail on the causation element of their First Amendment claim. Plaintiffs therefore are not entitled to preliminary injunctive relief. This case will likely require a full trial on the merits, where witnesses for both parties will be subject to cross-examination and where the Court will be equipped to make detailed findings and credibility determinations. But a trial—particularly one requiring the coordination of three judges and their respective chambers staff—is a substantial undertaking.

Plaintiffs have indicated that a revised districting plan must be enacted no later than December 19, 2017, to allow orderly implementation in advance of the 2018 midterms. (ECF No. 177–1 at 31.) Plaintiffs also have suggested that an injunction should issue no later than August 18, 2017, to accommodate legislative mapmaking or, if necessary, a judicially imposed map. (*Id.* at 32.) Despite the Court's diligence in ruling on the pending preliminary injunction motion (which has been a priority for each member of this panel), that August date has already come and gone. Since the Court cannot deliver the remedy

Plaintiffs have requested, Plaintiffs' opposition to a stay pending *Whitford* loses considerable force. It is unclear what hardship Plaintiffs will suffer by waiting a few months if, as a practical matter, the Court would have been unable to cure any constitutional ill in advance of the 2018 midterms even had it scheduled a trial at the earliest opportunity.[7]

Second: while the Supreme Court no doubt benefits from the efforts of lower courts in resolving difficult legal issues, it is not clear how additional proceedings in this case would aid the Court's resolution of *Whitford*. The threshold justiciability question that the Court must again confront in *Whitford* is hardly a novel one, and this panel has rigorously analyzed that threshold question in the separate opinions in *Shapiro II*. The *Whitford* litigants and the Justices will have access to those opinions during the forthcoming proceedings. Further, as the divergent opinions in *Vieth* illustrate, the Justices are not bound to decide *Whitford* along the lines that the

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[7] Plaintiffs alternatively propose that the Court should enter a permanent injunction and then stay enforcement of that injunction so that the parties may expeditiously take their appeal. (ECF No. 193 at 3.) The Court declines to do so. The Court will not abandon its duty to conscientiously resolve this years-long dispute so that the parties may squeeze their case onto the Supreme Court's fall calendar. Nor will the Court make the findings that would support a permanent injunction—including that Plaintiffs have suffered an irreparable injury and that, "considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted," *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006)—only to then stay that equitable remedy. Rather, the Court will enjoin the State to implement a new map if *but only if* it becomes persuaded that Plaintiffs have proved each element of their First Amendment claim to the requisite degree of certainty.

Western District of Wisconsin found persuasive. If the First Amendment theory that Plaintiffs here have proposed and that two members of this panel have recognized as justiciable strikes one or more of the Justices as workable, the Justices certainly may adopt, co-opt, modify, or otherwise incorporate elements of that theory into a framework for decision or a possible framework for future cases.

Here is the bottom line: a stay in these proceedings will not preclude the Supreme Court from taking advantage of the important legal work that has been done in this case, and the marginal gains—if any—that further fact-finding might offer the Justices would be greatly outweighed by the efficiency costs of charging ahead only to later learn that Plaintiffs must return to square one (or, perhaps, that their action is no longer viable).

III. Conclusion

Though the members of this panel differ in their views concerning the implications of Supreme Court precedent, the evidence Plaintiffs have thus far adduced, and the efficient management of this complicated and important case, all agree that political gerrymandering is a noxious and destructive practice. The segregation of voters by political affiliation so as to achieve purely partisan ends is repugnant to representative democracy. *See Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2658 (2015). This Court will not shrink from its responsibility to adjudicate any viable claim that such segregation has occurred in Maryland. But in order to *correctly* adjudicate such a claim, the Court must first insure that it is proceeding on the correct legal foundation—that in measuring the legality and constitutionality of any redistricting plan in Maryland it

is measuring that plan according to the proper legal standard. Following the Supreme Court's decision in *Whitford*, this panel will be better equipped to make that legal determination and to chart a wise course for further proceedings.

For the foregoing reasons, an Order shall enter DENYING Plaintiffs' preliminary injunction motion, and a separate Order shall enter HOLDING IN ABEYANCE the pending cross-motions for summary judgment and STAYING further proceedings pending the Supreme Court's decision in *Whitford*.

Judge Russell joins all but Part II.B of this Memorandum and joins the accompanying Orders. Judge Niemeyer joins neither the Memorandum nor the Orders.

NIEMEYER, Circuit Judge, dissenting:

In denying the plaintiffs' motion for a preliminary injunction, the majority overlooks the obvious and relies on abstract notions of the causal relationship between intent and effect that bear no relationship to the real world evidence regarding the conduct at issue or to the First Amendment standard adopted in this case. Its entire reason for denying the injunction rests on a bizarre notion of causation that requires the exclusion of all possible alternative explanations, however remote and speculative. When that effort inevitably fails, it concludes that causation has not been established, despite extraordinarily strong evidence of the connection between intent and effect. I believe that the record could not be clearer that the mapmakers specifically intended to dilute the effectiveness of Republican voters in the Sixth Congressional District and that the actual dilution that they

accomplished was caused by their intent. Accordingly, the motion should be granted.

The record demonstrates, without any serious contrary evidence, that the Maryland Democrats who were responsible for redrawing congressional districts in 2011 *specifically* intended to dilute the votes of Republicans in the Sixth District and in fact did so. They identified likely Republican voters and moved them in large numbers into the Eighth District, which had a safe margin of Democratic voters. They simultaneously replaced these Republican voters with Democratic voters from the Eighth District. More specifically, they moved 360,000 persons (roughly one-half of the District's population) out of the former Sixth District—when only 10,000 had to be moved in response to the 2010 census—and simultaneously moved 350,000 into the "new" Sixth District. And critically, in making those moves, they focused on voting histories and party registration to move 66,400 registered Republicans out of the Sixth District and replace them with 24,400 registered Democrats, creating a Democratic voter majority in the new Sixth District of 192,820 Democrats to 145,620 Republicans. Prior to the massive shuffle, the Sixth District had 208,024 Republicans and 159,715 Democrats. This 2011 shuffle accomplished the single largest redistricting swing of one party to another of any congressional district in the Nation.

Consistent with this evidence, the State's Democratic leadership stated that their reshuffling of voters by voting history was specifically intended to flip the Sixth District from Republican to Democratic so as to create a 7 to 1 Democratic congressional delegation. For example, Maryland Governor Martin O'Malley, who led the effort to develop a new con-

gressional map after the 2010 census, stated that he wanted to redraw the lines of the Sixth District to "put more Democrats and Independents into the Sixth District" and ensure "the election of another Democrat." He added, "Yes, this was clearly my intent." And other Democrats involved in the process similarly revealed their intent with statements indicating, for example, that the Sixth District was redrawn to "minimize the voice of the Republicans" and to "hit[]" Republican Congressman Roscoe Bartlett from the Sixth District "pretty hard." Moreover, the firm hired to draw the map was given only two instructions—to come up with a map (1) that protected the six incumbent Democrats and (2) that would produce a 7 to 1 congressional delegation.

Republican voters affected by the redrawing of the Sixth District commenced this action, contending that they were targeted, based on the way they voted in the past, with the intent to dilute their vote and diminish their representational rights, in violation of the First Amendment. On the State's motion to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(6), we held that the plaintiffs stated a cause of action and would succeed in their challenge of the Sixth District's gerrymander if they were to demonstrate (1) that the mapdrawers redrew the district lines with the specific intent to impose a burden on voters because of how they voted in the past or because of the political party with which they were affiliated; (2) that the targeted voters suffered a tangible, concrete burden on their representational rights; and (3) that the mapdrawers' intent to burden a particular group of voters by reason of their views was the but-for cause of the concrete effect. Simply, the standard requires a showing of (1) specific intent, (2) concrete effect, and (3) causation between the

first two requirements. *See Shapiro v. McManus*, 203 F. Supp. 3d 579, 596–97 (D. Md. 2016).

Following the completion of extensive discovery, the plaintiffs filed a motion for a preliminary injunction with a request to advance the trial on the merits under Rule 65(a)(2) so as to obtain a final injunction ordering a redrawing of the lines defining the Sixth District without the use of data that reveal how voters registered or voted in the past.

* * *

The widespread nature of gerrymandering in modern politics is matched by the almost universal absence of those who will defend its negative effect on our democracy. Indeed, both Democrats and Republicans have decried it when wielded by their opponents but nonetheless continue to gerrymander in their own self interest when given the opportunity. The problem is cancerous, undermining the fundamental tenets of our form of democracy. Indeed, as Judge Bredar has observed in this case, gerrymandering is a "noxious" practice with "no place in a representative democracy." *Shapiro*, 203 F. Supp. 3d at 600 (Bredar, J., dissenting).

The Supreme Court has joined the chorus of voices recognizing the potential ills inflicted on our democracy by gerrymandering. Accepting the general proposition that partisan gerrymandering, when sufficiently extreme, violates the Constitution, the Justices have nonetheless yet to agree on a standard for determining when the practice crosses the line. *See Vieth v. Jubelirer*, 541 U.S. 267, 292 (2004) (plurality opinion); *id.* at 308 (Kennedy, J., concurring in the judgment). For this reason, a minority of the Justices have indicated that the issue of whether partisan

gerrymandering violates the Equal Protection Clause is not justiciable. *See id.* at 305.

But a categorical rule that would abandon efforts at judicial review surely cannot be accepted lest it lead to unacceptable results. For instance, in Maryland, which has a voting population that historically votes roughly 60% for Democrats and 40% for Republicans, the Democrats, as the controlling party, could theoretically create eight safe Democratic congressional districts by assigning to each district six Democrats for every four Republicans, *regardless of their geographical location*. Citizens residing in Baltimore City, others residing in Garrett County in the western portion of the state, and yet others residing in the suburbs of Washington, D.C., could all be assigned to a single district so that the Democrats would outnumber Republicans by a margin of 60% to 40%. Under such a map, no district would have a single boundary, nor indeed any relationship to geography or to the communities that constitute the State, and neighbors would have different Representatives. Such a pointillistic map would, of course, be an absurd warping of the concept of representation, resulting in the very "tyranny of the majority" feared by the Founders. Yet, such an extreme possibility would be open to the most politically ambitious were courts categorically to abandon all judicial review of political gerrymandering.

I believe that the First Amendment standard previously adopted by us in this case does not allow for such a possibility. Building on the Supreme Court's previous holdings that ensure "one person, one vote" and that prevent racially motivated gerrymanders, we held earlier in this case that when district mapdrawers target voters based on their prior,

constitutionally protected expression in voting and dilute their votes, the conduct violates the First Amendment, effectively punishing voters for the content of their voting practices. *See Shapiro*, 203 F. Supp. 3d at 595–96. This First Amendment test focuses *on the motive* for manipulating district lines, *and the effect* the manipulation has on voters, *not on the result* of the vote. It is therefore sufficient in proving a violation under this standard to show that a voter was targeted because of the way he voted in the past and that the action put the voter at a concrete disadvantage. The harm is not found in any particular election statistic, nor even in the outcome of an election, but instead on the intentional and targeted burdening of the effective exercise of a First Amendment representational right. Recent comments of Supreme Court Justices made both in this case and in *Vieth* have suggested that this standard is available for assessing the constitutionality of a gerrymander. And under this standard, I respectfully conclude, the plaintiffs have succeeded in carrying their burden.

The majority instead expresses doubts as to whether the earthquake upheaval in the political landscape of the Sixth District was attributable to the fulfillment of the Democrats' gerrymandering plan, positing that the flip of the Sixth District might have been attributable to changes in voting preferences or other demographics. But this view reflects nothing more than an effort to skirt around the obvious—that the Democrats set out to flip the Sixth District; that they made massive shifts in voter population based on registration and voting records to accomplish their goal; and that they succeeded.

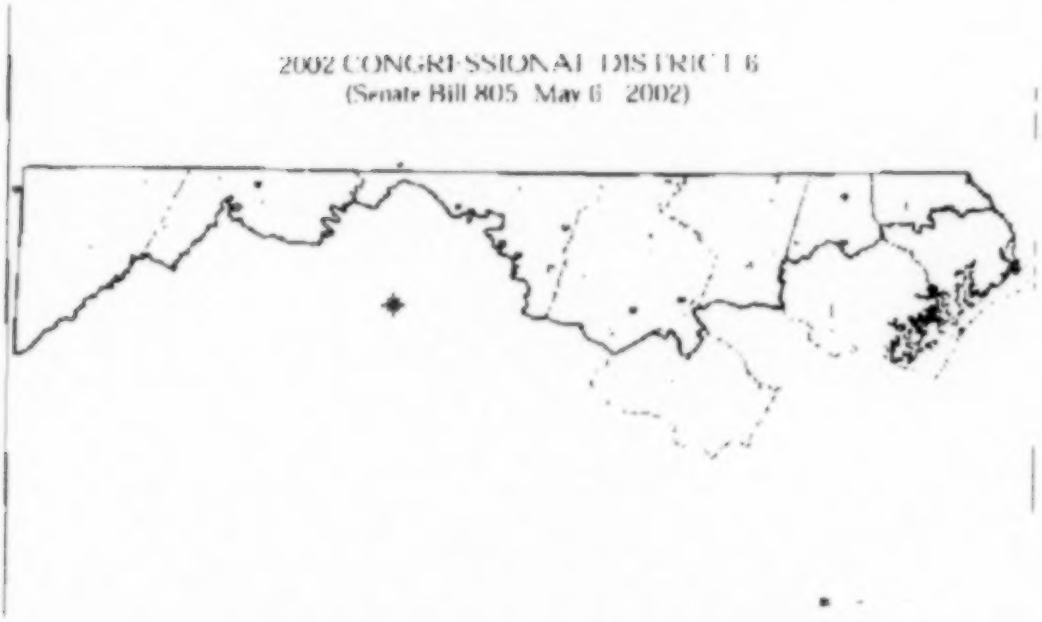
The plaintiffs have not only made the requisite showing that they are likely to succeed on the merits, they have actually succeeded well in demonstrating that the State's gerrymandering violated their First Amendment rights. I would accordingly issue the injunction requested and require the redrawing of the Sixth District's boundaries without the use of information about how citizens voted in the past.

I

A. Facts of Record

The historical facts of record are not disputed. Following the 2010 census, the State of Maryland was required to redraw the lines of its eight congressional districts to ensure that each district had an equal share of the State's population. This action focuses on the boundaries that the State chose to draw for the Sixth District.

Historically, the Sixth District included western Maryland and much of north-central Maryland, and after the Supreme Court's announcement of the "one person, one vote" rule in *Wesberry v. Sanders*, 376 U.S. 1 (1964), the Sixth District had always included all of the State's five most northwestern counties—Garrett, Allegany, Washington, Frederick, and Carroll Counties. After the 2002 redistricting, the District also included a small northern portion of Montgomery County and larger portions of Baltimore and Harford Counties, as shown.



At the time of the 2010 congressional election — the last held prior to the 2011 redistricting—47% of the District's 446,000 eligible voters were registered Republicans, 36% were registered Democrats, and 16% were registered Unaffiliated, making the District the most Republican in the State. Joint Stipulations ¶ 10 & Ex. 2 at 2 (ECF No. 104). Representative Roscoe Bartlett, a Republican, had continuously represented the District since 1993, and he won reelection in 2010 by a margin of 28%. *Id.* ¶ 8.

The 2010 census showed that the Sixth District had grown somewhat, having 10,186 residents more than the ideal adjusted population of 721,529 for a Maryland congressional district, a variation of only 1.4%. Joint Stipulations ¶¶ 9, 52. Nonetheless, the Democratic mapdrawers responsible for the 2011 redistricting plan redrew the District's boundaries far more dramatically than was necessary to move 10,186 voters from the District. Indeed, the new Sixth District retained only 51% of its original population, retaining the residents of Garrett, Allegany,

Washington Counties, and a portion of the residents of Frederick County and moved the other half—roughly 360,000 residents—to other districts. Approximately 60% of these residents—those from Frederick County and more than half the population of Carroll County—were shifted into the Eighth District, which had previously been confined almost entirely to the heavily Democratic Montgomery County. In the place of the removed residents, the plan added to the new Sixth District approximately 350,000 residents from Montgomery County, most of whom had previously been assigned to the Eighth District. The final 2011 map for the Sixth District was as follows:

was predominately Republican, while the area added was predominately Democratic. Specifically, in the precincts removed from the Sixth District, there were on average approximately 1.5 times as many registered Republicans as Democrats. By contrast, in the precincts added to Sixth District, registered Democrats outnumbered Republicans by more than 2 to 1. In total, the reshuffling of the Sixth District's bound-

aries resulted in a net reduction of more than 66,000 registered Republicans and a net increase of some 24,000 registered Democrats, for a swing of about 90,000 voters. *See* Opening Expert Report of Dr. Peter A. Morrison ¶ 134 & tbl. 1 (ECF No. 177-35); Opening Expert Report of Prof. Michael P. McDonald at 12 (ECF No. 177-19).

Not surprisingly, this major reshuffling of the Sixth District's population directly affected the District's political complexion. At the time of the 2012 congressional election (the first held under the new map), the major parties' respective shares of the District's registered voters roughly reversed compared to just two years before. Of the new District's roughly 437,000 eligible voters, 33% were registered Republicans, 44% were registered Democrats, and 22% were registered as Unaffiliated. Joint Stipulations ¶ 53 & Ex. 19. In the 2012 election, Democratic candidate John Delaney, a newcomer to politics, defeated Republican incumbent Bartlett by a 21% margin, and he was elected again in 2014 and 2016. *Id.* ¶ 54.

The parties have stipulated that "[o]ne widely understood consequence of the Plan was that it would make it more likely that a Democrat rather than a Republican would be elected as representative from the [Sixth] District." Joint Stipulations ¶ 31. But the record demonstrates even more. Far from being an incidental, though anticipated, byproduct of achieving some other set of redistricting goals, the Maryland Democrats who controlled the 2011 redistricting process sought to assure themselves of a 7 to 1 Democratic delegation by flipping the Sixth District to Democratic control.

Governor O'Malley, who was both "the leader of [Maryland's] Democratic Party," O'Malley Dep.

46:20–21 (ECF No. 177-3), and "directly in charge of running the congressional redistricting process," *id.* at 30:19–20, agreed that he "set out to draw the borders in a way that was favorable to the Democratic Party," *id.* at 9:22–10:2. As he later testified:

> [T]hose of us in leadership positions in our party, the Speaker, the Senate President, the Democratic Dean of the Delegation, myself, Lieutenant Governor, we all understood that, while our—while we must fulfill our responsibility on redistricting, must be mindful of constitutional guidelines, restrictions, case law, statutes, it was also—part of our intent was to create a map that was more favorable for Democrats over the next ten years and not less favorable to them. Yes, that was clearly one of our many [goals].

Id. at 81:1–11. Specifically, O'Malley wanted to use the redistricting process to change the overall composition of the U.S. House Delegation to seven Democrats and one Republican by flipping either the First District, on the eastern shore of Maryland, or the Sixth District, in Western Maryland. *Id.* at 22–27. Because altering the political makeup of the First District, the only other Maryland district represented by a Republican, would have required awkwardly "jump[ing] the Chesapeake Bay and draw[ing] a line in such a way that [would] put[] . . . more Democratic voters [in] the Eastern Shore [district]," *id.* at 24:16–19, he stated that "*a decision was made to go for the Sixth*," *id.* at 27:3–4.

Following the customary process in Maryland, Governor O'Malley pursued two courses for developing a revised congressional map. For one, he created the public-facing "Governor's Redistricting Advisory

Committee," and for the other, he "asked Congressman [Steny] Hoyer, . . . the dean of the [U.S.] House delegation," to "lead the effort. . . to inform the [Committee] about congressional redistricting" and "come up with a map that a majority of the congressional delegation supports." O'Malley Dep. 47:20–48:5; *see also* Willis Dep. 185–88 (ECF No. 177-14) (agreeing that, historically, "[t]he process starts with the [Democratic] members of Congress," who "[e]ndeavor to come to a consensus," "and then it flows to the governor and legislators," who "do their best to respect the wishes . . . of the congressional delegation"). Consistent with this customary procedure, the record shows that the work performed on behalf of the Democratic members of Maryland's congressional delegation largely shaped the contours of the new Sixth District that the Advisory Committee ultimately recommended to Governor O'Malley. *See* Miller Dep. 97:19 (ECF No. 177-15) (testifying that the map "primarily was drawn by the congressional people").

The Advisory Committee held public hearings across the State from July through September 2011 and received comments from members of the public. Joint Stipulations ¶ 22. At hearings conducted in western Maryland, residents provided suggestions regarding potential changes to the shape of the Sixth District. Several of these residents testified about various connections between Frederick County and Montgomery County—including Interstate 270 ("I-270"), a 35-mile highway running between the City of Frederick and southern Montgomery County—and advocated for replacing part of the Sixth District with territory from Montgomery County. None of the speakers contemplated a map that would remove much of Frederick County *itself*, which had been in-

cluded in its entirety in the Sixth District since 1872. *See, e.g.*, Public Hearing Testimony (ECF No. 186-3) at MCM 000029–31 ("[T]he start of the Sixth District is pretty easy, with Garrett, Allegany, Washington, and Frederick, you've got a nucleus there. . .. Once you start with those four counties,. . . your orientation should be to go east into either Howard, or go southeast into Montgomery Counties, to the greatest extent possible, and. . . leave Harford, Baltimore, and even portions of Carroll for a Baltimore-oriented district").

While the Advisory Committee was holding public hearings across the State, the Democratic members of Maryland's U.S. House Delegation—led by Representative Hoyer, a self-described "serial gerrymanderer," ECF No. 191-3—had already begun to redraw the State's congressional map. Indeed, around the time that the results of the 2010 census became available in late February/early March 2011—months before the Advisory Committee was even created—Hoyer and the other Maryland Democrats in the House retained NCEC Services, Inc., a political consulting firm that provides "electoral analysis, campaign strategy, political targeting, and GIS [geographic information system] services" to Democratic organizations. ECF No. 177-17; *see also* Hawkins Dep. 28–31 (ECF No. 177-4); ECF No. 177-18. NCEC was specifically charged with drawing a map that maximized "incumbent protection" for Democrats and changed the congressional delegation from 6 Democrats and 2 Republicans to 7 Democrats and 1 Republican, and it was given no other instruction as how to draw the map. Hawkins Dep. 40–42, 47–49.

The primary NCEC analyst assigned to the task, Eric Hawkins, analyzed various congressional redistricting plans to inform the Democratic members of the Maryland delegation how "different options would change their districts," and he personally prepared between 10 and 20 different draft congressional maps using a GIS computer software program called Maptitude for Redistricting. Hawkins Dep. 36–38. Maptitude allows users to "[c]reate districts using any level of geography," "[a]dd political data and election results," and "[u]pdate historic results to new political boundaries." Joint Stipulations ¶ 28. With Maptitude, "data reflecting . . . citizens' political party affiliation and voting histories[] can be used to determine how the outcome of historical elections would have changed . . . if the proposed plan had been in place in prior years," *id.* ¶ 30, thus enabling users to accurately predict the likely outcome of future elections.

Hawkins specifically used a proprietary metric created by NCEC called the Democratic Performance Index (the "DPI"), which indicates how a generic Democratic candidate would likely perform in a particular district. As Hawkins explained, the DPI "is an average of how statewide candidates perform over time in competitive elections" that is "weighted differently for different election years," and which "take[s] into account past voting history in a state or a district." Hawkins Dep. 24:12–18. NCEC also calculated separate versions of the DPI specific to federal and state races—with the federal DPI "only us[ing] federal races" and the state DPI "only us[ing] state races"—to better account for "ticket splitting." *Id.* at 25.

Hawkins used the DPI to meet the dual "goals" given to NCEC—namely, to draw a map that would maximize "incumbent protection" for the Democrats currently representing Maryland districts in Congress and that would "chang[e] the make-up of Maryland's U.S. House delegation from six Democrats and two Republicans to seven Democrats and one Republican." Hawkins Dep. 40–42; *see also id.* at 47–49. With respect to this 7 to 1 goal, Hawkins' efforts focused on redrawing the Sixth District's lines to increase its federal DPI, which Hawkins calculated under the preexisting map as standing at 37.4%, indicating low Democratic performance and correspondingly strong Republican performance. Over the course of working with Maryland's Democratic House Delegation and their staff, Hawkins prepared several different draft maps under which the Sixth District would have a 51% federal DPI. In preparing these maps, Hawkins considered neither "any measure of compactness," *id.* at 126:12–13, nor whether "there was a community of interest related to the I-270 corridor," *id.* at 128:19–20. Rather, "[t]he intent was to see if there was a way to get another Democratic district in the state." *Id.* at 230:19–20.

Maps were also proposed by third-party entities, but those maps resulted in a far smaller federal DPI for the Sixth District. For example, a map proposed by the Maryland Legislative Black Caucus would have resulted in a federal DPI of 39% for the Sixth District, ECF No. 177-34, a proposal a senior congressional staffer worried would be "a recipe for 5–3, not 7–1," ECF No. 177-36. Needless to say, these proposals did not influence the maps submitted by Hawkins to the Democratic House Delegation.

Ultimately, Maryland's Democratic members of the U.S. House Delegation proposed and forwarded to the state Democratic leadership at least two maps prepared by Hawkins. The shape of the Sixth District in one of these maps, which had a DPI of 51.36%, was very similar to the plan that was ultimately adopted. *See* Decl. of Dr. Michael McDonald at 4 & fig. 5 (ECF No. 191-5).

After Maryland's U.S. House Democrats submitted their proposals, further work was done by a group of senior staffers of O'Malley, Maryland Senate President Thomas Miller, and Maryland House Speaker Michael Busch. These senior staffers were equipped with a laptop loaded with the Maptitude software; "party registration data and voter turnout data," including at the census block level, the smallest geographic unit used by the U.S. Census Bureau; and a "data file[] that contained Democratic Performance Index information at the precinct level," the smallest geographic unit in Maryland (averaging around 3,000 people) at which election results are reported. Weissman Decl. ¶¶ 3–5 (ECF No. 186-11). These state Democratic officials thus continued to use the DPI—as well as other information about how local groups of citizens had previously voted and the political party with which they were affiliated—to finalize a map for the Advisory Committee.

The Advisory Committee publicly released a proposed congressional redistricting map on October 4, 2011, with the Committee's lone Republican casting the sole dissenting vote against the plan. Joint Stipulations ¶ 32. The Committee's map had a federal DPI of 53% in the Sixth District, which was greeted as "good news" by the man who was widely expected to be the Democratic nominee to represent the newly

redrawn Sixth District in the upcoming 2012 election. ECF No. 177-25.

Members and staff of the Advisory Committee briefed a joint session of the state House and Senate Democratic Caucuses about their recommended congressional plan on October 3, 2011. Joint Stipulations ¶ 35. Talking points prepared for Senate President Miller's introductory remarks encouraged him to emphasize that "[e]ven though the map isn't pretty, it accomplishes a few important goals," including "creat[ing] an opportunity for Montgomery County to control two congressional districts"; "preserv[ing] all six incumbent Democrats in 'safe' districts," none of which would have "less than 58% Democratic performance"; and "giv[ing] Democrats a real opportunity to pick up a seventh seat in the delegation by targeting Roscoe Bartlett." ECF No. 177-23. The talking points continued, "In the face of Republican gains in redistricting in other states around the nation, we have a serious obligation to create this opportunity." *Id.*

Following Senate President Miller's remarks, Chairwoman Jeanne Hitchcock delivered a PowerPoint presentation that stated that the Sixth and Eighth Districts had been "[c]onfigured to reflect the North-South connections between Montgomery County, the I-270 Corridor, and western portions of the State." Joint Stipulations, Ex. 6. The record suggests that those in attendance were skeptical that the I-270 corridor justified dramatically redrawing both the Sixth and the Eighth Districts. For example, immediately after Hitchcock's presentation, Democratic Delegate Curt Anderson told a reporter, "It reminded me of a weather woman standing in front of the map saying, 'Here comes a cold front,'

and in this case the cold front is going to be hitting Roscoe Bartlett pretty hard." Joint Stipulations ¶ 46 & Ex. 13. And, while listening to Hitchcock give a similar presentation earlier in the day, one senior congressional aide who had been intimately involved in the redistricting process wrote to another, "This is painful to watch. . .. I'm not sure I buy the themes they are selling. Hopefully they have some better ones for the public face of it." ECF No. 177-58.

On October 15, 2011, Governor O'Malley announced that he was submitting a map to the General Assembly "that was . . . substantially the same as" the Advisory Committee's proposal, Joint Stipulations ¶ 33, and two days later, on October 17, Senate President Miller introduced the Governor's proposed redistricting map as Senate Bill 1 at a special legislative session. With only minor technical amendments, Senate Bill 1 was signed into law on October 20, 2011, three days after it had been introduced. *Id.* ¶ 34; *see* Md. Code Ann., Elec. Law §§ 8-701 to -709.

"No Republican Senator or Delegate voted for Senate Bill 1 in committee or on the floor in recorded roll call votes." Joint Stipulations ¶ 36. Moreover, while the legislation was progressing rapidly through the General Assembly, numerous legislators made comments reflecting their clear understanding that the massive redrawing of the Sixth District was designed primarily to give the eventual Democratic nominee a distinct electoral advantage over the Republican nominee. For example, one Delegate bluntly stated in a floor speech that he supported the map because it meant "more Democrats in the House of Representatives." *Id.* ¶ 44. Another Delegate stated in an October 17 interview that, "What we're doing is

we are trying to get more, in terms of—currently we have two Republican districts and six Democratic Congressional districts and we're going to try to move that down to seven and one, with the additional Congressional district coming more out of Montgomery county and going into western Maryland that would give the Democrats more." *Id.* ¶ 47. One Democratic Senator who voted for the bill nonetheless lamented in a floor speech that partisan gerrymandering was a problem across America, adding that "it's a process where we dress up partisan and political ambition on both sides of the aisle in high principal, *but we can all tell what's really going on.*" Joint Stipulations ¶ 43(a) (emphasis added). And the only Democratic Senator to vote against the bill stated in an October 14 interview, "[W]hen you look at the way these districts are drawn, they're absolutely drawn with one thing in mind. . .. *[I]t's certainly drawn so that you can minimize the voice of the Republicans.*" ECF No. 177-41 at 16 (emphasis added).

The effect of the Sixth District's wholesale recomposition was precisely as intended. Tellingly, in October 2012, the Cook Political Report released an analysis of "all 435 newly redrawn Congressional districts in the country" using its Partisan Voter Index ("Cook PVI"), ECF No. 177-52 at 1, a well-respected "measurement of how strongly a United States congressional district or state leans toward the Democratic or Republican Party, compared to the nation as a whole," ECF No. 177-51; *see also* Lichtman Dep. 131 (ECF No. 177-49) (testimony of State's expert witness that the Cook PVI is a "well respected" and "well regarded" metric). The Cook Report specifically examined "which districts underwent the most dramatic alterations in redistricting" and found that Maryland's Sixth District experienced the single

largest redistricting swing of any district anywhere in the Nation. ECF No. 177-52 at 6–8. Specifically, before the 2011 redistricting, the Sixth District had a Cook PVI of "R+13" and a "Solid Republican" label; after redistricting, the District received a Cook PVI of "D+2" and a "Likely Democratic" label. *Id.* at 8. An academic analysis that looked at the accuracy of the Cook Report's forecasting helps unpack the significance of this swing. When the Cook Report has rated a district "Solid Republican" on the eve of a congressional election, the Republican candidate has won the race 99.7% of the time; when a district has been rated as "Likely Democratic," the Democratic candidate has won 94% of the time. *See* James E. Campbell, *The Seats in Trouble Forecast of the 2010 Elections to the U.S. House*, 43 Pol. Sci. & Politics 627, 628 (2010) (ECF No. 191-8).

Moreover, the Cook Report's analysis of the effect of redistricting on the Sixth District was corroborated by NCEC's own data. According to NCEC, in the 2016 congressional election cycle, "Democrats [nationwide] won only four districts where DPI was below 50 percent"; in none of those districts was the DPI below 40%, as it was in the Sixth District prior to redistricting. ECF No. 191-7. Conversely, among the 160 districts across the country with a DPI above 50%, all but 12 were won by the Democratic candidate. *Id.* Both Cook's and NCEC's data confirmed that the Democrats held a clear electoral advantage and that Republican voices had indeed been minimized.

B. Proceedings

Three Maryland citizens, acting *pro se*, commenced this action in November 2013, naming as defendants the Chair and the Administrator of the

State Board of Elections and alleging that the 2011 redistricting plan violated their rights under the First Amendment and Article I, § 2, of the U.S. Constitution. A single district court judge granted the State's motion to dismiss, *Benisek v. Mack*, 11 F. Supp. 3d. 516 (D. Md. 2014), and the Fourth Circuit summarily affirmed, *Benisek*, 584 F. App'x 140 (4th Cir. 2014). The Supreme Court reversed, however, concluding that the plaintiffs' constitutional challenge was not "wholly insubstantial" and that therefore it had to be decided by a district court composed of three judges, as required by 28 U.S.C. § 2284. *Shapiro v. McManus*, 136 S. Ct. 450, 456 (2015) (quoting *Bell v. Hood*, 327 U.S. 678, 682 (1946)). In doing so, the Court observed that the theory underlying the plaintiffs' First Amendment claim had originally been suggested by Justice Kennedy in *Vieth* and was "uncontradicted by the majority in any of [the Court's] cases." *Id.*

After remand, the plaintiffs, now represented by counsel, filed a second amended complaint, adding six additional plaintiffs and refining the theory underlying their constitutional challenge. Two of the original plaintiffs later agreed to their dismissal from the action, leaving seven plaintiffs, all of whom are registered Republicans who lived in the Sixth District prior to the 2011 redistricting. Three of these plaintiffs still reside in the Sixth District, while four of them now live in the Eighth District as a result of the redistricting.

The plaintiffs' second amended complaint alleged that those responsible for the 2011 congressional map "purposefully and successfully flipped [the Sixth District] from Republican to Democratic control by strategically moving the [D]istrict's lines by reason of

citizens' voting records and known party affiliations." Second Am. Compl. ¶ 1. They alleged that "[t]he drafters of the Plan focused predominantly on the voting histories and political-party affiliations of the citizens of the State in deciding how to" redraw the Sixth District's lines and that they "did so with the clear purpose . . . of diluting the votes of Republican voters." *Id.* ¶ 6. They alleged further that the plan achieved its intended effect, imposing a significant burden on the former Sixth District's Republican voters and preventing them in 2012 and 2014 "from continuing to elect a Republican representative . . . , as they had in the prior ten congressional elections." *Id.* ¶ 7(b). And they maintained that "the State cannot justify the cracking of the [Sixth] District by reference to geography or compliance with legitimate redistricting criteria." *Id.* ¶ 7(c). Based on these allegations, the plaintiffs claimed in essence that the plan's redrawing of the Sixth District's boundaries constituted unlawful retaliation in violation of their rights under the First Amendment.

In an opinion issued August 24, 2016, this three-judge court denied the State's motion to dismiss, concluding that the plaintiffs had adequately alleged a justiciable claim for relief. *Shapiro*, 203 F. Supp. 3d at 586, 600. We held that to succeed on their claim, the plaintiffs would have to prove three elements: *first*, "that those responsible for the map redrew the lines of [their] district with the *specific intent* to impose a burden on [them] and similarly situated citizens because of how they voted or the political party with which they were affiliated"; *second*, "that the challenged map diluted the votes of the targeted citizens to such a degree that it resulted in a tangible and concrete adverse effect"; and *third*, "that, absent the mapmakers' intent to burden a particular group

of voters by reason of their views, the concrete adverse impact would not have occurred." *Id.* at 596–97.

Following the completion of extensive discovery, the plaintiffs filed a motion for a preliminary injunction and requested, pursuant to Rule 65(a)(2), that the trial on the merits be advanced and consolidated with a hearing on their motion. Briefing on the plaintiffs' motion for a preliminary injunction was completed, with the parties presenting a robust evidentiary record of more than 80 exhibits, and on July 14, 2017, we conducted a half-day hearing on the motion.

II

This court is clearly of one mind that, as a general matter, partisan gerrymandering is noxious to our form of democracy. And if we read correctly the public sentiment, that view is widely shared. Indeed, the Supreme Court, with no disagreement from any Justice, has concluded that severe partisan gerrymandering is incompatible with democratic principles. Yet, Judge Bredar, writing only for himself, expresses doubts as to whether claims of partisan gerrymandering are justiciable.

To be sure, drawing the lines of congressional districts is a political process. But the Supreme Court has repeatedly recognized that the political nature of redistricting does not immunize the process from claims that are based on violations of particular provisions of the Constitution. Thus, in *Baker v. Carr*, 369 U.S. 186 (1962), the Court recognized that when redistricting denies citizens equal protection, the issue is justiciable because "the equal protection clause is not diminished by the fact that the discrimination relates to political rights," *id.* at 210 (quoting

Snowden v. Hughes, 321 U.S. 1, 11 (1944)). Similarly, in *Wesberry v. Sanders*, 376 U.S. 1 (1964), the Court concluded that the political nature of redistricting does not "immunize state congressional apportionment laws which debase a citizen's right to vote from the power of courts to protect the constitutional rights of individuals from legislative destruction, a power recognized at least since our decision in *Marbury v. Madison* . . .. The right to vote is too important in our free society to be stripped of judicial protection," *id.* at 6–7. In a similar vein, the Court has found justiciable an equal protection redistricting claim where "race was *the predominant factor motivating* the legislature's decision to place a significant number of voters within or without a particular district." *Ala. Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1267 (2015) (emphasis added) (quoting *Miller v. Johnson*, 515 U.S. 900, 916 (1995)). And in circumstances more analogous to those presented in this case, the Court in *Davis v. Bandemer*, 478 U.S. 109, 113, 118–27 (1986), held that a claim alleging an unconstitutional dilution of votes of one political party's members was justiciable.

While claims alleging violations of individual constitutional rights are justiciable and have been so since *Marbury v. Madison*, the Court has been unable to find a standard by which to conclude that suspect districts, although equal in population, violate the Equal Protection Clause based on extreme partisanship. *See Vieth*, 541 U.S. at 281–301. Even so, five Justices in *Vieth* concluded that the issue remained justiciable. Moreover, Justice Kennedy, canvassing the Court's decisions, appropriately recognized that claims asserting other constitutional rights, such as a violation of the First Amendment, could be reviewable. As he stated:

> First Amendment concerns arise where a State enacts a law that has the purpose and effect of subjecting a group of voters or their party to disfavored treatment by reason of their views. In the context of partisan gerrymandering, that means that First Amendment concerns arise where an apportionment has the purpose and effect of burdening a group of voters' representational rights.

Id. at 314 (Kennedy, J., concurring in the judgment). He went on to point out that "[i]f a court were to find that a State did impose burdens and restrictions on groups or persons by reason of their views, there would likely be a First Amendment violation." *Id.* at 315. Indeed, in this very case, a unanimous Supreme Court expressly invited our consideration of the First Amendment theory articulated by Justice Kennedy, noting that the theory remains "uncontradicted by the majority in any of our cases." *Shapiro*, 136 S. Ct. at 456. And we concluded, from a fuller review of the Supreme Court's First Amendment jurisprudence, that a First Amendment theory is viable and justiciable. *See Shapiro*, 203 F. Supp. 3d at 594–97.

To begin, it is "axiomatic" that the government violates the First Amendment when it regulates speech "based on its substantive content or the message it conveys." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995). As the Court noted, while restrictions based on content presumptively offend the First Amendment, "[w]hen the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is *all the more blatant*." *Id.* at 829 (emphasis added). As a result, "[t]he government must abstain from regulating speech when the spe-

cific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Id.* Moreover, viewpoint discrimination is no more constitutional when the offending restriction does not explicitly mention any individual viewpoint. Rather, facially neutral restrictions are nonetheless subject to strict scrutiny when they "were adopted by the government 'because of disagreement with the message [the speech] conveys.'" *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015) (alteration in original) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

Moreover, the government may not suppress one viewpoint even in spheres of activity where it can lawfully restrict the categories of speech permitted and the time, place, and manner in which it is conveyed. *Rosenberg*, 515 U.S. at 829 ("The necessities of confining a forum to the limited and legitimate purposes for which it was created may justify the State in reserving it for certain groups or for the discussion of certain topics"); *see also Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45–49 (1983). So, for example, while the government may lawfully exercise significant control over its employees, it may not fire someone solely because he belongs to a disfavored political party, as this would amount to blatant "government discrimination based on the viewpoint of one's speech or one's political affiliations." *Bd. of Cty. Comm'rs v. Umbehr*, 518 U.S. 668, 683 (1996); *see also Pickering v. Bd. of Educ.*, 391 U.S. 563, 568–70 (1968) (barring discharge of public-school teacher for writing letter critical of school board).

Indeed, even where the government is allowed, or even required, to *consider* the viewpoint of expres-

sion that it regulates, this does not give it permission to *intentionally advance* one viewpoint over the other. Thus, in *Board of Education v. Pico*, 457 U.S. 853 (1982), the Court evaluated a First Amendment challenge to a school board's removal of certain library books from school libraries. The Court recognized that, although the local school board "possess[ed] significant discretion to determine the content of their school libraries," its discretion could "not be exercised in a narrowly partisan or political manner." *Id.* at 870. As the Court observed, "If a Democratic school board, motivated by party affiliation, ordered the removal of all books written by or in favor of Republicans, few would doubt that the order violated the constitutional rights of the students denied access to those books." *Id.* at 870–71.

In cases where some regulation of expression is inevitable, such as in *Pico*, assessing a constitutional claim "depends upon *the motivation* behind [the government's] actions." *Pico*, 457 U.S. at 871 (emphasis added). In assessing the school board's removal of books in that case, the Court explained, "If petitioners *intended* by their removal decision to deny respondents access to ideas with which petitioners disagreed, and if this intent was the decisive factor in petitioners' decision, then petitioners have exercised their discretion in violation of the Constitution." *Id.* And the Court defined "decisive factor" to mean "a 'substantial factor' in the absence of which the opposite decision would have been reached." *Id.* n. 22 (citing *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977)).

Given these stringent limitations on the government's ability to advance ideological motives by regulating speech, it would be strange indeed if a State's

administration of elections were not similarly limited. In fact, the Court has noted specifically that "in exercising their powers of supervision over elections and in setting qualifications for voters, the States may not infringe upon basic constitutional protections." *Kusper v. Pontikes*, 414 U.S. 51, 57 (1973). Thus, because an election campaign is "an effective platform for the expression of views on the issues of the day," *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983), the Court has deemed justiciable challenges to laws that threaten "the right of qualified voters, regardless of their political persuasion, to cast their votes effectively," *id.* at 787 (quoting *Williams v. Rhodes*, 393 U.S. 23, 30 (1968)). Similarly, while a State may constitutionally choose locations for polling places, even though some voters may be more inconvenienced by a location than others, *see Lee v. Va. State Bd. of Elections*, 843 F.3d 592, 601 (4th Cir. 2016), the Constitution would obviously not permit the State to locate a polling place specifically to make it more difficult for voters of a particular party to vote.

Against the backdrop of this First Amendment jurisprudence, the plaintiffs' First Amendment claim is readily justiciable. We previously concluded that plaintiffs stated a claim in alleging that the defendants drew district lines in order to dilute and thus diminish the effectiveness of their expression. The allegation that district lines were drawn *with the intent* to suppress the effectiveness of one political party's voters is essentially no different from the familiar claims of adverse employment action due to protected political speech, *see, e.g.*, *Mt. Healthy*, 429 U.S. at 283–84, or claims that a government has taken an otherwise permissible action with the impermissible

motive of silencing one side of a political debate, *see, e.g.*, *Pico*, 457 U.S. at 871.

Moreover, judicial abdication from partisan gerrymandering cases, as advocated by Judge Bredar, would have the most troubling consequences.* If there were no limits on the government's ability to draw district lines for political purposes, a state might well abandon geographical districts altogether so as to minimize the disfavored party's effectiveness. In Maryland, where roughly 60% of the voters are Democrats and 40% Republicans, the Democrats

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* Judge Bredar protests that it "is incorrect" to state that he concludes that partisan gerrymandering claims are not justiciable. *Ante* at 12. Yet he expressly relies on what he considers to be the plaintiffs' failure to establish justiciability as a basis for denying their motion for a preliminary injunction. *Ante* at 13–14; *see also ante* at 2.

The standing law is that partisan gerrymandering claims *are justiciable*. *See Bandemer*, 478 U.S. at 113. To be sure, various Supreme Court Justices continue to debate the question, but they have not held otherwise. Judge Bredar relies on comments by Justices who were not speaking for the Court to conclude that justiciability has been cast into doubt. And he further speculates that any rule of justiciability previously recognized may be changed in *Gill v. Whitford*, No. 16-1161, now pending before the Court. Lower courts are admonished, however, to follow the Supreme Court's existing law until the Court changes it and not to speculate on changes. *See Bosse v. Oklahoma*, 137 S. Ct. 1, 2 (2016) (per curiam) ("Our decisions remain binding precedent until we see fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality"); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions").

could create eight safe congressional districts by assigning to each district six Democrats for every four Republicans, regardless of the voters' geographical location. In a similar vein, a Republican government faced with these same voters could create a map in which two districts consisted entirely of Democrats, leaving six that would be 53% Republican. Such a paradigm would be strange by any standard. A congressman elected in such a system could have constituents in Baltimore City, others in Garrett County, and yet others in the suburbs of Washington, D.C., preventing him from representing any of his constituents effectively. Similarly, members of a single household could be assigned to different congressional districts, and neighbors would be denied the ability to mobilize politically. Such partisan gerrymandering, at its extreme, would disrupt the "very essence of districting," which "is to produce a different. . . result than would be reached with elections at large, in which the winning party would take 100% of the legislative seats." *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973).

Drawing on traditional First Amendment jurisprudence, which includes "well-established standards for evaluating ordinary First Amendment retaliation claims," *Shapiro*, 203 F. Supp. 3d at 596, we thus previously held that a plaintiff states a claim for unconstitutional gerrymandering when he demonstrates that (1) "those responsible for the map redrew the lines of his district with the *specific intent* to impose a burden on him and similarly situated citizens because of how they voted or the political party with which they were affiliated," (2) "the challenged map diluted the votes of the targeted citizens to such a degree that it resulted in a tangible and concrete adverse effect," and (3) "the mapmakers' intent to

burden a particular group of voters by reason of their views" was a but-for cause of the "adverse impact." *Id.* at 596–97. And that is the standard that we must now apply.

III

To grant a preliminary injunction, we must conclude that the plaintiffs are likely to succeed on the merits; that without the injunction, they are likely to suffer irreparable harm; that the balance of equities favors them; and that the injunction would be in the public interest. *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). In this case, the only issue seriously disputed is whether the plaintiffs are likely to succeed on the merits. I address the remaining requirements in Part IV.

Under the standard established in this case for a First Amendment claim, the plaintiffs must show (1) intent, (2) concrete adverse effect, and (3) causation. *Shapiro*, 203 F. Supp. 3d at 596–97. If the plaintiff makes a sufficient showing of these requirements, "the State can still avoid liability by showing that its redistricting legislation was narrowly tailored to achieve a compelling government interest." *Id.* at 597.

First, with respect to the mapmakers' intent, the process described in the record admits of no doubt. Maryland Democratic officials worked to establish the congressional district boundaries in 2011 with a narrow focus on diluting the vote of Republicans in the Sixth District, so as to ensure the election of an additional Democratic representative. Governor O'Malley, who was responsible for the redistricting process, asked Congressman Hoyer to begin the redistricting effort, and Hoyer retained NCEC to draw up district maps that protected Democratic incum-

bents and flipped the Sixth District from Republican to Democrat. Hawkins, an NCEC analyst, prepared district maps using NCEC's proprietary DPI metric to assess the likelihood that a district would elect a Democratic candidate. He homed in on maps using data that predicted a Democratic victory in the Sixth District, unlike maps submitted by third parties, which had sub-50% DPI values for the Sixth District. Hawkins submitted several maps, each with a higher DPI in the Sixth District, to the Democratic members of Maryland's congressional delegation. The delegation, in turn, culled NCEC's proposed maps down to a handful where the DPI for the District was approximately 51% and submitted those to the Advisory Committee. The Advisory Committee's staffers then used those maps, the DPI information, and their data on party registration and voter turnout to finalize a map with a 53% DPI for the Sixth District, which the General Assembly thereafter adopted.

The Advisory Committee's reliance on the DPI was essential to satisfying the Committee's intent to flip the Sixth District from safely Republican to securely Democratic. Notes prepared for Senate President Miller's remarks to the state House and Senate Democratic Caucuses about the redistricting plan emphasized that the map "create[d] an opportunity for Montgomery County to control two congressional districts"; "preserve[d] all six incumbent Democrats in 'safe' districts," none of which would have "less than 58% [DPI]"; and "g[ave] Democrats a real opportunity to pick up a seventh seat in the delegation by targeting Roscoe Bartlett." ECF No. 177-23. Governor O'Malley admitted that his Advisory Committee sought to "create a district" that "would be more likely to elect a Democrat than a Republican." O'Malley Dep. 82:16–18; *see also id.* at 27:12–15 (de-

scribing aim of "put[ting] more Democrats and Independents into the Sixth District" to ensure "the election of another Democrat"). Senate Majority Leader Garagiola admitted that "one of the purposes[] [was] to make the Sixth Congressional District have 53 percent Democratic performance." Garagiola Dep. 27:4–9 (ECF No. 177-24). These sorts of statements, particularly by delegates and state senators during the General Assembly's abbreviated consideration of the proposed map, are legion. *See, e.g.*, Joint Stipulations ¶¶ 40–51.

The State's argument that its officials intended only "to allow Democrats to have an equally effective voice in the election of a representative" in the Sixth District—an intent that it argues "cannot be equated with an intent to burden [Republicans'] representational rights"—is hollow. Defs' Memo. at 31. Even if the intent to make one party "more competitive" were constitutionally permissible, the record shows something materially different. Members of the Advisory Committee, with the help of NCEC, worked to craft a map that would specifically transform the Sixth District into one that would *predictably* —that is, by a 94% chance—elect a Democrat by removing Republicans from the District and adding Democrats in their place.

More fundamentally, the State's argument misunderstands the law. If the government uses partisan registration and voting data purposefully to draw a district that disfavors one party, it cannot escape liability by recharacterizing its actions as intended to favor the other party. The First Amendment does not distinguish between these intents. A school board, for example, cannot manipulate its stock of library books for "narrowly partisan" rea-

sons, whether its conduct is described as removing all books written by Republicans or as constructing a library full of books written by Democrats. *Pico*, 457 U.S. at 870–71. Where the government singles out a person or class of persons based on their political affiliation and voting and acts so as to hamper their ability to effectively engage in future expression, it has run afoul of the First Amendment no matter how it characterizes its intent.

The State also argues that its officials did not act with impermissible intent because they did not target *specific voters* based on their individual party affiliation or voting history. This argument, too, is based on a misunderstanding of First Amendment jurisprudence. Here, the plaintiffs have shown that they were targeted for disfavored treatment because of a shared marker of political belief –their Republican party affiliation. The fact that the State moved Republican voters out of the Sixth District *en masse*, based on precinct-level data, and did not examine each voter's history with care before taking that punitive action does not make its action less culpable under the First Amendment. *Cf. Miller*, 515 U.S. at 920 (condemning State's targeting of areas with "dense majority-black population" for inclusion in district); *Sweezy v. Wyman*, 354 U.S. 234, 250 (1957) ("Any interference with the freedom of a party is simultaneously an interference with the freedom of its adherents"). If anything, the First Amendment is *more* skeptical where the government uses peoples' nominal party alignment as a proxy for their actual expression. *See, e.g., Elfbrandt v. Russell*, 384 U.S. 11, 19 (1966).

Thus, because State officials have admitted that they intended "to create a district where the people

would be more likely to elect a Democrat than a Republican" and that they removed likely Republican voters from the Sixth District specifically to achieve that aim, the plaintiffs have established that the State acted with constitutionally impermissible intent.

Second, with respect to the adverse effect element, the plaintiffs have shown that the redrawn Sixth District did, in fact, burden their representational rights. At the threshold, it is important to reiterate that, under the standard set forth in our denial of the motion to dismiss, a plaintiff who has shown that the State acted with impermissible retaliatory intent need not show that the linedrawing altered the outcome of an election—though such a showing would certainly be relevant evidence of the extent of the injury. *See Shapiro*, 203 F. Supp. 3d at 598. And, contrary to the State's argument, the plaintiffs need not show that the new Sixth District was *certain* to produce a Democratic congressman. *See Kusper*, 414 U.S. at 58 (explaining that, while restriction on primary voting did not "deprive [voters] of all opportunities to associate with the political party of their choice," it was nevertheless "a 'substantial restraint' and a 'significant interference' with the exercise of the constitutionally protected right of free association"); *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 74 (1990) (holding that adverse employment actions not amounting to discharge may nevertheless violate the First Amendment). Rather, the plaintiffs must show only that their electoral effectiveness was meaningfully burdened—and, of course, that it was intentionally burdened for partisan reasons. That is, a voter must have experienced a "demonstrable and concrete adverse effect" on his "right to have 'an equally effective voice in the election' of a repre-

sentative.'" *Shapiro*, 203 F. Supp. 3d at 598 (quoting *Reynolds v. Sims*, 377 U.S. 533, 565 (1964)); *see also Balt. Sun Co. v. Ehrlich*, 437 F.3d 410, 416 (4th Cir. 2006) ("[W]e have recognized a distinction between an adverse impact that is *actionable*, on the one hand, and a *de minimis* inconvenience, on the other").

The plaintiffs here have made such a showing. By several measures, the new Sixth District map severely disfavors Republican voters. In creating the map, the State removed over 66,000 registered Republicans from the Sixth District and added some 24,000 registered Democrats, such that Republican voters went from outnumbering Democrats 1.3 to 1 (47% of the district's registered eligible voters being Republicans and 36% Democrats) to nearly the exact inverse (44% Democrats, 33% Republicans). Joint Stipulations ¶¶ 10, 53. According to the DPI metric used by the mapmakers and the Cook PVI metric endorsed by the State's expert, Republican voters in the new Sixth District were, in *relative* terms, much less likely to elect their preferred candidate than before the 2011 redistricting, and, in *absolute* terms, they had no real chance of doing so. Indeed, the Cook report deemed the district's swing—from "Solid Republican" (R+13) to "Likely Democratic" (D+2)—the largest of any district in the country. ECF No. 177-52 at 6–8. And, historically, "Likely Democratic" districts elect a Democrat 94% of the time. *See* Campbell, *supra*, at 628.

Moreover, while the State's linedrawing need not change the outcome of an election to be culpable, the fact that a Democratic candidate was elected in the three elections following the 2011 redistricting supports the fact that the Republican voters have suf-

fered constitutional injury. In other words, the Democratic officials who drew the map achieved what they aimed to do—to make Republican voters in the Sixth District less effective.

The State argues that the plaintiffs have not adequately shown that the new Sixth District map actually "chilled" their protected expression. Defs' Memo. at 38. This argument has two flaws. First, a First Amendment injury need not take the form of "chilling" or "deterring" speech. Rather, a plaintiff may claim retaliation if his expression is "adversely affected," *Suarez Corp. Indus. v. McGraw*, 202 F.3d 676, 686 (4th Cir. 2000), and surely the government's reduction of the *effectiveness* of expression qualifies as an adverse effect. Second, there is no requirement an *individual* plaintiff show that the government's action has specifically deterred him from engaging in protected conduct. The Supreme Court's patronage cases, which are rooted in retaliation principles, have expressly repudiated any requirement "that dismissed employees prove that they, or other employees, have been coerced into changing, either actually or ostensibly, their political allegiance." *Branti v. Finkel*, 445 U.S. 507, 517 (1980). Rather, "[t]he determination of whether government conduct or speech has a chilling effect or an adverse impact is an objective one." *Balt. Sun*, 437 F.3d at 416. Thus, to evaluate whether the State's conduct caused a First Amendment injury, we assess only whether its purposeful dilution of Republicans' electoral power would adversely affect the protected expression of a reasonable person situated similarly to the plaintiffs. *See id.*

The State's action here would impair a reasonable Republican voter's exercise of his First Amend-

ment rights. Republicans in the Sixth District faced a severe political disadvantage after the 2011 redistricting. This itself is a constitutional injury. Moreover, it is not hard to see how the dilution of Republican voters' effectiveness could deter reasonable voters from full participation in the political process. A committed Republican voter who finds himself in the minority may well lose interest in voting or in supporting candidates for a legislative office that, realistically, they are unlikely to fill. A different Republican voter in the new Sixth District might choose to abandon his party, finding his energy better spent supporting moderate candidates in Democratic primaries. *See Rutan*, 497 U.S. at 73 ("[E]mployees who have been laid off may well feel compelled to engage in whatever political activity is necessary to regain regular paychecks and positions corresponding to their skill and experience"); *Elrod v. Burns*, 427 U.S. 347, 355 (1976) ("[A] pledge of allegiance to another party, however ostensible, only serves to compromise the individual's true beliefs"). Here, there was direct evidence of chilled expression, as participation in the Sixth District's Republican primaries dropped substantially between 2010 and 2014, which supports the notion that partisan manipulation deterred the robust exercise of representational rights. There is also anecdotal evidence of Republicans not voting after the redistricting because of confusion or loss of interest. Of course, voters have no constitutional right to be successful in electing the candidate they favor, and voters regularly lose interest in politics or switch parties for reasons unrelated to gerrymandering. But this does not answer the relevant First Amendment question. In short, the purposeful reduction of one party's effectiveness may well chill the protected expression of that party's voters, even if no

individual plaintiff establishes, as a factual matter, that *he* was so chilled.

Finally, as to causation, the plaintiffs have established that, absent the State's retaliatory intent, the Sixth District lines would not have been drawn to dilute the electoral power of Republican voters to the same extent. The framework governing our inquiry into causation is set forth in *Mt. Healthy*, 429 U.S. 274. Specifically, once the plaintiffs have established that the government's constitutionally impermissible intent "was a 'motivating factor' in [its] decision," the burden shifts to the State to show that, even absent the forbidden intent, "it would have reached the same decision." *Id.* at 287 (quoting *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 270 (1977)). In other words, assuming that the State intended to burden the plaintiffs' representational rights, we must then determine "if this intent was the decisive factor in [their] decision" to do so. *Pico*, 457 U.S. at 871; *see also Vill. of Arlington Heights*, 429 U.S. at 270 n.21 (explaining that, where "the same decision would have resulted even had the impermissible purpose not been considered," then "there would be no justification for judicial interference with the challenged decision"). Under the *Mt. Healthy* framework, therefore, where unlawful intent *in fact* drove the State to its decision, the State cannot escape liability by "hypothesiz[ing] that it *might* have employed lawful means of achieving the same result." *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 320 n.54 (1978) (opinion of Powell, J.) (emphasis added) (declining to allow a remand because it "would result in fictitious recasting of past conduct").

The State rejects *Mt. Healthy*'s burden-shifting framework for causation, contending that it applies

only in the context of public employment. But there is simply no support for the State's cramped reading of that case. On the contrary, *Mt. Healthy* stands for a general, common-sense principle applicable in *all* retaliation-based First Amendment claims—that, where the government takes an injurious action, an injured party need not show that the government would never have taken the same action anyway. The Supreme Court has accordingly relied on the *Mt. Healthy* framework in several types of claims unrelated to public employment, and indeed in allegations of constitutionally forbidden intent beyond those related to protected expression. *See Pico*, 457 U.S. at 870, 871 n.22 (school board's removal of books from school library); *Wilkie v. Robbins*, 551 U.S. 537, 558 n.10 (2007) (Bureau of Land Management's intimidation of landowner to induce his grant of an easement); *Texas v. Lesage*, 528 U.S. 18, 20–21 (1999) (per curiam) (university's rejection of application under race-conscious admissions program); *Vill. of Arlington Heights*, 429 U.S. at 270 n.21 (village's denial of rezoning request). The framework is no less applicable here.

As already noted, the record demonstrates that the State intended to burden the plaintiffs' representational rights, which leaves the question of whether the State has shown that, absent this intent, it would have drawn lines that similarly burdened Republican voters in the Sixth District. While it probably would be impossible for the State to show that it would have drawn the *exact same district lines* absent the impermissible intent, to satisfy its end of the burden-shifting inquiry, it would at least have to show that it would have drawn lines that similarly burdened the plaintiffs' representational rights.

Even this, however, the State cannot do. It points to two primary objectives that it claims justify the Sixth District's reconfiguration in 2011—preventing the new First District from crossing the Chesapeake Bay and grouping residents of the I-270 corridor together in one district. But the evidence of intent in this case is overwhelming and undisputed that the State drew the lines of the Sixth District to flip the District from Republican to Democratic control, and it is implausible that consideration of these other objectives would have led to a map that similarly burdened Republican voters. Again, in tasking Hawkins with drawing a map, Democratic officials provided him with only two goals—protecting Democratic incumbents and obtaining a seventh Democratic seat. Hawkins was *not* instructed to consider whether "there was a community of interest related to the I-270 corridor." Hawkins Dep. 128:19–20. The record shows no invocation of I-270 as a justification for the shapes of the Sixth and Eighth District's until Jeanne Hitchcock's presentation of the nearly final map to the joint session of House and Senate Democratic Caucuses and, unsurprisingly, even Democratic delegates found it a flimsy justification for the dramatic reshuffling of the two districts. *See, e.g.*, Joint Stipulations ¶ 46.

The majority, in finding that the plaintiffs failed to show a likelihood of success on the causation element, commits two significant errors. First, it mischaracterizes our previous holding on the causation element to adopt a new standard that is inconsistent with First Amendment jurisprudence. Second, it applies the new standard to the facts in a confusing and inherently inconsistent manner.

The majority begins correctly by stating the causation standard from our previous holding—that the gerrymander must create a tangible, adverse impact that would not have occurred but for the unconstitutional intent of the mapmakers. *See ante* at 17. But then it leaps from this correct statement of the causation standard to its own newly created stan-dard by requiring "proof that *but for* the gerrymander, the challenged effect (here, *the switch in political power* in the Sixth District) would not have happened." *Id.* (second emphasis added). Explaining its new standard further, the majority states that the causation element "would be satisfied *only* if [the evidence showed that] Roscoe Bartlett would have won reelection in 2012 had the prior map remained intact." *Ante* at 18. Indeed, it expressly contemplates that voters' injury takes the form of Bartlett's loss to Delaney, "but only if that loss is attributable to gerrymandering or some other constitutionally suspect activity. If the loss is instead a consequence of voter choice, that is not an *injury*." *Id.* These arguments, however, represent a failure to understand First Amendment jurisprudence, which focuses not on who wins but on the burden imposed on First Amendment rights—here, on the right to cast an undiluted vote. In short, the majority's new First Amendment standard depends on an *election's results*, not on the adverse impact of dilution on the targeted voters. Under the applicable First Amendment framework, however, the adverse effect is *the dilution* of votes—and the corresponding burdening of expression by voters—regardless of how the election turned out.

Under the majority's standard requiring an altered *election outcome*, critical First Amendment violations could never be remedied. For instance, claims that the party in control of State government delib-

erately attempted to suppress political speech *before* an election or deliberately located polling places to inconvenience the other party could never be pursued under the majority's standard, because the plaintiffs would be unable to show that the election results were tipped as a result of the unconstitutional conduct. More to the point, under the majority's new standard, no redistricting map could be challenged *before* an election. Any standard of causation that would so arbitrarily limit our ability to redress constitutional injuries must be rejected.

In applying its new standard to the facts in the record, the majority's analysis is yet more confusing. The majority accepts that the defendants here *did in fact intend* to retaliate against voters who had previously voted for Republican candidates in the Sixth District by drawing a map that moved over 66,000 Republicans from the old Sixth District and introduced some 24,000 new Democrats to diminish the Republicans' ability to express their political viewpoint. The majority also accepts, as it has to, that this map *was in fact adopted* and that, under this new map, the Republicans' voice was diminished and the Democrats *achieved unprecedented electoral success in the Sixth District*. I submit that only one conclusion can be drawn from these accepted facts—that a degree of vote dilution significant enough to place Republican voters at a concrete electoral disadvantage was caused by the conduct that the State specifically intended. Yet, somehow, the majority holds that these actions *did not cause* the retaliatory harm that the State intended. The majority somehow concludes that the State's plan was ineffective, despite its intended effect coming to pass. Such a view of causation necessarily embraces the bizarre notion that other, unnamed factors might have coincidently

caused those effects. Under such reasoning, a defendant who intentionally poisons a victim's drink could not be found to cause the death because the victim *might have* died from a heart attack *anyway*. Yet this is the argument that the majority embraces.

Moreover, applying a causation standard that seeks to eliminate all possible but unproved factors, however remote and speculative, is directly contrary to the causation standard that the Supreme Court has established for retaliation claims. In *Mt. Healthy*, the Court required only a showing that the constitutionally impermissible intent was *a motivating factor*, such that the State cannot escape liability by hypothesizing some remote or speculative cause. *See Mt. Healthy*, 429 U.S. at 287.

In sum, the record amply proves that the State violated the First Amendment under the standard we previously adopted in this case. Indeed, on this record, there is no way to conclude otherwise, even as a possibility. *A fortiori*, it follows that the plaintiffs have demonstrated *the likelihood* of success on the merits, as required for entering a preliminary injunction.

IV

The other three factors governing our issuance of a preliminary injunction do not require extensive discussion. Absent an injunction, the plaintiffs are likely to suffer irreparable harm. Because the State's construction of the Sixth District in 2011 likely violated the plaintiffs' First Amendment rights, the plaintiffs are experiencing ongoing constitutional injury without a new map. *See League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014) ("Courts routinely deem restrictions on fundamental voting rights irreparable injury"). Moreo-

ver, the plaintiffs seek a preliminary injunction *now* so as to have a new map in place for the 2018 congressional election cycle. We must be mindful of the fact that, "once the election occurs, there can be no do-over and no redress. The injury to these voters is real and completely irreparable if nothing is done to enjoin this law." *Id.*

The balance of the equities here also favors the plaintiffs. To be sure, requiring Maryland to redraw the Sixth District's boundaries is no trivial matter. But where, as here, plaintiffs establish a strong likelihood of success on the merits and irreparable injury, they have generally shown that the equities work in their favor. *Direx Israel, Ltd. v. Breakthrough Med. Corp.*, 952 F.2d 802, 812–13 (4th Cir. 1991). And though there is no doubt that the State would have to expend resources in redrawing district lines that comply with our injunction, the fact that the State regularly creates new legislative maps so as to comply with other constitutional requirements, like "one person, one vote," suggests that the burden will not be unduly onerous. Indeed, our discussion of the merits reveals the ease and precision with which lines can be drawn using mapmaking software, and we are confident that the State, with the aid of such software, will have little trouble devising an alternative map that complies with the law. The plaintiffs in fact have offered an alternative map in this case where only the line between the Sixth and Eighth Districts had to be redrawn.

Finally, it is obvious that an injunction here will serve the public interest. An injunction will not only redress a serious, ongoing constitutional injury, but will also enable the plaintiffs and those similarly sit-

uated to them—a large portion of Maryland voters—to more fully participate in congressional elections.

In sum, this fulsome record overwhelmingly shows the plaintiffs' satisfaction of our First Amendment standard, and the ongoing harm can only be rectified by the entry of an injunction. I would therefore grant the plaintiffs' motion in full.

V

If the plaintiffs were to appeal the denial of their motion for an injunction, *see* 28 U.S.C. § 1253, I would have no objection to the entry of a stay. Failing that, however, the mere pendency of *Gill v. Whitford*, No. 16-1161, in the Supreme Court does not justify delaying a final decision in this case alleging a serious breach of an important constitutional right. The nature of the claim in *Gill*, as well as the facts supporting the claim, is materially different from the nature of the claim before us. *Gill* centers on an Equal Protection claim relating to statewide redistricting, while this case involves a First Amendment claim arising from the line-drawing of a single district. Accordingly, at this juncture, I do not join the majority's *sua sponte* entry of a stay.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

THREE-JUDGE COURT

Stephen M. SHAPIRO, et al., Plaintiffs,

v.

David J. MCMANUS, Jr., et al., Defendants.

Case No. 13-cv-3233

Signed August 24, 2016

Before Niemeyer, Circuit Judge, and Bredar and Russell, District Judges.

NIEMEYER, Circuit Judge:

The plaintiffs, who are Maryland voters and registered Republicans, challenge the constitutionality of Maryland's 2011 congressional redistricting law under the First Amendment and Article I, §§ 2 and 4, of the U.S. Constitution. They allege in their second amended complaint (1) that the State drew the lines of Maryland's Sixth Congressional District with the specific intent to punish and retaliate against them and similarly situated voters by reason of how they voted and their political party registration; (2) that the State, in furtherance of this purpose, drew the Sixth District's lines in such a manner as to dilute their vote and burden their political expression; and (3) that the State succeeded in its efforts, inflicting a tangible and concrete adverse effect. The question presented is whether the plaintiffs' complaint states a justiciable claim that survives the State's motion to

dismiss under Federal Rule of Civil Procedure 12(b)(6). We conclude that it does, recognizing, as the Supreme Court stated in remanding this case to this three-judge court, that the plaintiffs' "legal theory [is] . . . uncontradicted by the majority in any of [the Court's] cases," *Shapiro v. McManus*, —— U.S. ——, 136 S. Ct. 450, 456, 193 L.Ed.2d 279 (2015), and that their complaint adequately employs First Amendment jurisprudence to state a plausible claim for relief. Accordingly, we deny the State's motion to dismiss.

I

A

At this stage, we take the factual allegations of the plaintiffs' complaint as true.

Based on the results of the 2010 census, Maryland was entitled to eight seats in the U.S. House of Representatives, the same number it had been allotted since the 1960 census. Although Maryland's population increased by 9% from 2000 to 2010, its population growth was not evenly distributed throughout the State, necessitating redistricting to ensure districts of equal population. *See Evenwel v. Abbott*, —— U.S. ——, 136 S. Ct. 1120, 1124, 194 L.Ed.2d 291 (2016) (recognizing that because "States must draw congressional districts with populations as close to perfect equality as possible," States "must regularly reapportion districts to prevent malapportionment").

On July 4, 2011, Governor Martin O'Malley, a Democrat, appointed five individuals to the Governor's Redistricting Advisory Committee: (1) Jeanne Hitchcock, Maryland's Secretary of Appointments and a former Deputy Mayor of Baltimore, a Demo-

crat; (2) State Senate President Thomas V. Mike Miller, Jr., a Democrat; (3) House of Delegates Speaker Michael E. Busch, a Democrat; (4) Richard Stewart, a businessman who chaired Governor O'Malley's reelection campaign for Prince George's County, a Democrat; and (5) James J. King, a businessman who had previously served one term in the Maryland House of Delegates, a Republican.

The Advisory Committee was charged with the task of drafting a redistricting plan and proposing a map for the State's eight congressional districts in light of the 2010 census results. To that end, it held 12 public meetings across the State between July 23 and September 12, 2011, receiving more than 350 comments from members of the public. The plaintiffs allege, however, that the Advisory Committee conducted its actual "deliberations and calculations entirely behind closed doors." Second Am. Compl. ¶ 45. When drawing its redistricting map, the Advisory Committee had access to the Maryland Board of Elections' statistical data, which provided "highly detailed geographic information about voter registration, party affiliation, and voter turnout across the State," including "voter registration by precinct, election day turnout by precinct and party, party share of vote by voting category, and voter consistency." *Id.* ¶¶ 46-47.

The Advisory Committee completed its map on October 4, 2011, with King, the Committee's lone Republican, casting the sole dissenting vote, and presented it to the Governor. After posting the map online and receiving additional comments from the public, the Governor announced on October 15 that he would submit to the legislature a plan that was "substantially similar" to the Advisory Committee's

proposal. Two days later, on October 17, the Governor's proposed redistricting map was introduced as Senate Bill ("S.B.") 1 at an emergency legislative session. That same day, the Senate Committee on Reapportionment and Redistricting, along with the House Rules Committee, held a joint hearing on S.B. 1 before voting to approve the bill. After adopting minor technical amendments, the Senate passed the bill the next day, October 18, sending it to the House of Delegates, which, after making additional technical amendments, passed it on October 19. The Senate concurred in the House's technical amendments, and the Governor signed S.B. 1 into law on October 20, 2011, three days after it had been introduced. *See* Md. Code Ann., Elec. Law §§ 8–701 to –709.

The enacted State Plan created eight congressional districts that were mathematically equal in population—seven of the districts having an adjusted population of 721,529 and the eighth having an adjusted population of 721,528. The changes effected by the State Plan, however, were far more extensive than those needed to achieve population equality. Indeed, while "six of the eight existing congressional districts remained within 3% of the ideal size of 721,529 people[,] . . . the Plan shuffled nearly one-in-three Marylanders from one district to another, scrambling the representation of 1.6 million people." Second Am. Compl. ¶ 61.

The reshuffling of Maryland's population was particularly extensive with respect to Maryland's Sixth Congressional District. Historically, the Sixth District included western Maryland and much of north-central Maryland. In the years following the Supreme Court's 1964 holding in *Wesberry v. Sand-*

ers, 376 U.S. 1, 84 S. Ct. 526, 11 L.Ed.2d 481 (1964), that States must conduct regular redistricting to ensure districts of equal population, Maryland adopted a series of five maps that were used in the 23 congressional elections held from 1966 through 2010. Under those maps, the Sixth District always included the State's five most northwestern counties in their entirety: Garrett, Allegany, Washington, Frederick, and Carroll Counties. Over the years, the Sixth District also included various portions of Baltimore, Howard, Montgomery, and Harford Counties to achieve the appropriate population count. But the identifiable core, consisting of the five northwestern counties, stayed constant, constituting not only a majority of the Sixth District's territory but also most of its population. Specifically, after the State revised its district lines in 1991 using the data from the 1990 census, 83% of the Sixth District's population lived in the five northwestern counties, and that number rose to 88% under the State's 2002 Redistricting Plan.

The 2010 census showed that, compared to the ideal district population of 721,529 residents, the Sixth District had 10,186 extra residents, a variation of only 1.4%. Yet, while the census data would have required only a small adjustment to remove some 10,000 residents from one of the counties along the District's eastern edge, but not from the five northwestern counties, the State completely reshuffled the Sixth District. It moved 360,000 residents out of the Sixth District—virtually one-half of its population—and then added to the District 350,000 residents from Montgomery County, a Democratic stronghold that includes Washington, D.C. suburbs. The plaintiffs allege that this wholesale shifting and transfer was done not "by reference to geography or compliance with legitimate redistricting criteria," Second

Am. Compl. ¶ 7(c), but rather to dilute the Republican voters' voice in the next election. The complaint alleges further that "a net total of over 65,000 registered Republican voters" were transferred from the Sixth District and "a net total of over 30,000 Democratic voters" were imported into the District, for a swing of some 95,000 voters. *Id.* ¶ 4. Moreover, although Frederick County had been included in the Sixth District continuously since 1872, the redistricting split the County's population roughly in half between the Sixth and Eighth Districts. Similarly, while Carroll County had been included in the Sixth District since 1966, the redistricting removed it from the Sixth District entirely and split its population between the Eighth and First Districts.

The plaintiffs' complaint alleges that the major reshuffling of the Sixth District's population directly affected the District's political complexion. Historically, the Sixth District was reliably Republican. Indeed, "[i]n the 70 years between January 1943 and January 2013, the [D]istrict was represented in Congress by members of the Republican Party in four out of every five years." Second Am. Compl. ¶ 78. In the 2010 election, Representative Roscoe Bartlett, the Republican candidate who had represented the Sixth District in Congress since 1993, won reelection by a margin of 28 percentage points. But because the areas removed from the Sixth District were predominantly Republican while the area added was predominantly Democratic, the parties' respective shares of the District's registered voters roughly reversed so that, at the time of the 2012 general election, 33% of the new Sixth District's registered voters were registered as Republicans, while 44% were registered as Democrats. In that election, Democratic candidate John Delaney, a newcomer to politics, defeated Rep-

resentative Bartlett by 21 percentage points, with "the long-time Congressman's share of the vote dropp[ing] from 61.45% to 37.9% in a single election cycle." *Id.* ¶ 86. Delaney won reelection in 2014.

Maryland's 2011 Redistricting Plan also affected the contours of other districts, most particularly Maryland's Eighth District. That district had previously included most of the portion of Montgomery County that was reassigned to the Sixth District, and it also absorbed many of the citizens of Frederick and Carroll Counties who were removed from the Sixth District. After redistricting, the Eighth District's proportion of registered Republicans rose significantly, but registered Democrats continued to outnumber registered Republicans by a sizeable margin. Specifically, prior to redistricting, registered Democrats outnumbered registered Republicans in the Eighth District by three to one; after redistricting, the ratio was roughly two to one. After redistricting, Representative Chris Van Hollen, a Democrat, continued to win reelection to represent the Eighth District after redistricting.

B

Three Maryland citizens, acting *pro se*, commenced this action in November 2013, naming as defendants the Chair and the Administrator of the State Board of Elections and alleging that the 2011 Redistricting Plan violated their rights under the First Amendment and Article I, § 2, of the U.S. Constitution. A single district court judge granted the State's motion to dismiss, *Benisek v. Mack*, 11 F. Supp. 3d 516 D.Md.2014), and the Fourth Circuit Court of Appeals summarily affirmed, *Benisek*, 584 Fed.Appx. 140 (4th Cir.2014). The Supreme Court, however, reversed, concluding that the plaintiffs'

constitutional challenge was not "wholly insubstantial" and that therefore it had to be decided by a district court composed of three judges, as required by 28 U.S.C. § 2284. *See Shapiro*, 136 S. Ct. at 456. In doing so, the Court recognized that the theory underlying the plaintiffs' First Amendment claim had originally been suggested by Justice Kennedy and was "uncontradicted by the majority in any of [the Court's] cases." *Id.*

After remand, the plaintiffs, now represented by counsel, filed a second amended complaint, adding six additional plaintiffs and refining the theory underlying their constitutional challenge to the 2011 congressional Redistricting Plan. The six new plaintiffs, as well as at least one of the original plaintiffs, are all registered Republicans who lived in the Sixth District prior to the Plan's enactment. While three of these plaintiffs still reside in the Sixth District, four of them now live in the Eighth District as a result of the Plan. The plaintiffs' complaint challenges the State's "cracking" of the Sixth District, alleging that those responsible for the 2011 Plan "purposefully and successfully flipped [the District] from Republican to Democratic control by strategically moving the [D]istrict's lines by reason of citizens' voting records and known party affiliations." Second Am. Compl. ¶ 1. They allege that "[t]he drafters of the Plan focused predominantly on the voting histories and political- party affiliations of the citizens of the State in deciding how to" redraw the Sixth District's lines and that they "did so with the clear purpose . . . of diluting the votes of Republican voters and preventing them from electing their preferred representatives in Congress." *Id.* ¶ 6. They allege further that the Plan achieved its intended effect, imposing a significant burden on the former Sixth District's Republican

voters by preventing them in 2012 and 2014 "from continuing to elect a Republican representative . . ., as they had in the prior ten congressional elections." *Id.* ¶ 7(b). And they maintain that "the State cannot justify the cracking of the [Sixth] District by reference to geography or compliance with legitimate redistricting criteria." *Id.* ¶ 7(c). Based on these allegations, they claim that the Plan's redrawing of the Sixth District's boundaries violated their rights under the First Amendment and §§ 2 and 4 of Article I of the U.S. Constitution.

The State again filed a motion to dismiss the complaint, arguing that the plaintiffs' claims are nonjusticiable because the plaintiffs "fail[ed] to set forth a discernable, manageable standard that would permit this Court to adjudicate their claims" under either the First Amendment or Article I. The State accepts that "unlawful political gerrymandering claims may be justiciable in concept" but emphasizes that the Supreme Court has yet to identify a judicially discernable and manageable standard for adjudicating such claims and has twice indicated that, in the absence of such a standard, political gerrymandering claims must be dismissed. *See League of United Latin American Citizens v. Perry (LULAC)*, 548 U.S. 399, 126 S. Ct. 2594, 165 L.Ed.2d 609 (2006); *Vieth v. Jubelirer*, 541 U.S. 267, 124 S. Ct. 1769, 158 L.Ed.2d 546 (2004). The State argues further that the plaintiffs "failed to allege that the Plan imposed any actual restriction on any of their recognized First Amendment rights."

The plaintiffs contend that their complaint "offers . . . what was missing in *Vieth* and *LULAC*: a clear and objective standard for identifying a constitutionally significant burden on the plaintiffs' repre-

sentational rights." Relying on Justice Kennedy's statement in his separate opinion in *Vieth* that "First Amendment concerns arise where an apportionment has the purpose and effect of burdening a group of voters' representational rights," 541 U.S. at 314, 124 S. Ct. 1769 (Kennedy, J., concurring in the judgment), they contend that the First Amendment offers a well-settled framework for considering political gerrymandering claims. They state that the framework would require the court to determine *first*, whether "the State consider[ed] citizens' protected First Amendment conduct in deciding where to draw district lines, and did . . . so with an intent to dilute the votes of those citizens by reason of their protected conduct"; *second*, whether "the redistricting map, in actual fact, dilute[d] the votes of the citizens whose constitutionally-protected conduct was taken into account to such a degree that it imposed a concrete adverse impact"; and *third*, whether the map was "necessary as drawn to achieve some compelling state interest." When assessed against this framework, they maintain that their complaint states a justiciable claim upon which relief can be granted.

II

The U.S. Constitution gives both the States and Congress a role in setting the procedural rules by which citizens select the members of the House of Representatives. Specifically, Article I provides that "[t]he House of Representatives shall be composed of Members chosen every second Year by the People of the several States," U.S. Const. art. I, § 2, cl. 1, and further that "[t]he Times, Places and Manner of holding Elections for . . . Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter

such Regulations," *id.* § 4, cl. 1. Article I thus "leaves with the States primary responsibility for apportionment of their federal congressional . . . districts," *Growe v. Emison*, 507 U.S. 25, 34, 113 S. Ct. 1075, 122 L.Ed.2d 388 (1993), while also granting Congress the power to override the decisions made by the States. Congress currently uses this power only to require that States establish single-member districts. *See* 2 U.S.C. § 2c ("In each State entitled . . . to more than one Representative . . ., there shall be established by law a number of districts equal to the number of Representatives to which such State is so entitled, and Representatives shall be elected only from districts so established, no district to elect more than one Representative").

The process of establishing and revising district lines is a "highly political task." *Growe*, 507 U.S. at 33, 113 S. Ct. 1075. Indeed, "[t]he very essence of districting is to produce a different . . . result than would be reached with elections at large, in which the winning party would take 100% of the legislative seats." *Gaffney v. Cummings*, 412 U.S. 735, 753, 93 S. Ct. 2321, 37 L.Ed.2d 298 (1973). Because the supporters of our country's two major political parties are not evenly distributed within any State, "[i]t is not only obvious, but absolutely unavoidable, that the location and shape of districts may well determine the political complexion of the area." *Id.* And those State officials charged with redistricting will of course "recognize the political consequences of drawing a district line along one street rather than another." *Id.* The practical "reality is that districting inevitably has and is intended to have substantial political consequences." *Id.*; *see also Vieth*, 541 U.S. at 285, 124 S. Ct. 1769 (plurality opinion) ("The Constitution clearly contemplates districting by political

entities, *see* Article I, § 4, and unsurprisingly that turns out to be root-and-branch a matter of politics").

Because redistricting is quintessentially a political process that the Constitution assigns to the States and Congress, federal courts' supervision is largely limited. *See Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 132 S. Ct. 1421, 1427, 182 L.Ed.2d 423 (2012) (recognizing that "a controversy involves a political question . . . where there is a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it" and that, "[i]n such a case, . . . a court lacks the authority to decide the dispute before it" (internal quotation marks and citations omitted)). For example, because "[p]olitics and political considerations are inseparable from districting and apportionment," a court cannot invalidate a map merely because its drafters took political considerations into account in some manner. *See Gaffney*, 412 U.S. at 753, 93 S. Ct. 2321. Indeed, such an approach "would commit federal and state courts to unprecedented intervention in the American political process." *Vieth*, 541 U.S. at 306, 124 S. Ct. 1769 (Kennedy, J., concurring in the judgment).

Moreover, citizens have no *constitutional* right to reside in a district in which a majority of the population shares their political views and is likely to elect their preferred candidate. Nor do political groups have any right to a district map under which their candidates are likely to win seats in proportion to the party's overall level of support in the State. *See Davis v. Bandemer*, 478 U.S. 109, 130, 106 S. Ct. 2797, 92 L.Ed.2d 85 (1986) (plurality opinion) ("Our cases . . . clearly foreclose any claim that the Constitution

requires proportional representation or that legislatures in reapportioning must draw district lines to come as near as possible to allocating seats to the contending parties in proportion to what their anticipated statewide vote will be"); *see also Vieth*, 541 U.S. at 288, 124 S. Ct. 1769 (plurality opinion) ("[The Constitution] guarantees equal protection of the law to persons, not equal representation in government to equivalently sized groups").

But even though the districting process is largely political in nature, State officials are nonetheless limited by specific provisions of the U.S. Constitution. *Cf. Rutan v. Republican Party of Ill.*, 497 U.S. 62, 64, 110 S. Ct. 2729, 111 L.Ed.2d 52 (1990) ("To the victor belong only those spoils that may be *constitutionally* obtained" (emphasis added)). To be sure, for many years, the Supreme Court "resisted any role in overseeing the process by which States draw legislative districts," *Evenwel*, 136 S. Ct. at 1123, wary of "enter[ing] th[e] political thicket," *Colegrove v. Green*, 328 U.S. 549, 556, 66 S. Ct. 1198, 90 L.Ed. 1432 (1946) (plurality opinion). But this changed with the Supreme Court's decision in *Baker v. Carr*, 369 U.S. 186, 82 S. Ct. 691, 7 L.Ed.2d 663 (1962), where the Court held that a claim alleging that a state-legislative map violated the Equal Protection Clause by establishing districts with unequal populations was justiciable.

Building on *Baker*, the Supreme Court subsequently invalidated a State's malapportioned congressional map in *Wesberry*, holding that Article I, § 2's provision for the election of Representatives " 'by the People of the several States' means that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's."

376 U.S. at 7–8, 84 S. Ct. 526. Today, under *Wesberry* and its progeny, "States must draw congressional districts with populations as close to perfect equality as possible." *Evenwel*, 136 S. Ct. at 1124. Similarly, the Court held in *Reynolds v. Sims* that "the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis," 377 U.S. 533, 568, 84 S. Ct. 1362, 12 L.Ed.2d 506 (1964), although "jurisdictions are permitted to deviate somewhat from perfect population equality to accommodate traditional districting objectives" when drawing these districts, *Evenwel*, 136 S. Ct. at 1124. Together, *Wesberry* and *Reynolds* establish the judicially enforceable rule of "one person, one vote."

Federal courts are also authorized to ensure that the districting process remains free from constitutionally prohibited racial discrimination. Thus, a plaintiff pursuing a racial gerrymandering claim under the Equal Protection Clause states a justiciable claim when he alleges that "race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." *Ala. Legislative Black Caucus v. Alabama*, —— U.S. ——, 135 S. Ct. 1257, 1270, 191 L.Ed.2d 314 (2015) (quoting *Miller v. Johnson*, 515 U.S. 900, 916, 115 S. Ct. 2475, 132 L.Ed.2d 762 (1995)). By showing "that the legislature subordinated traditional race-neutral districting principles . . . to racial considerations," *Miller*, 515 U.S. at 916, 115 S. Ct. 2475, a plaintiff triggers strict scrutiny, shifting the burden to the State to "demonstrate that its districting legislation is narrowly tailored to achieve a compelling interest," *id.* at 920, 115 S. Ct. 2475.

In addition to these constitutional limitations on the redistricting process, the Supreme Court has also recognized that *political* gerrymandering—a term that has been defined as "[t]he practice of dividing a geographical area into electoral districts, often of highly irregular shape, to give one political party an unfair advantage by diluting the opposition's voting strength," *Black's Law Dictionary* 802, 1346 (10th ed. 2014)—may well violate the Equal Protection Clause. But the Court has struggled to devise a standard for adjudicating political gerrymandering claims under the Equal Protection Clause.

In *Bandemer*, the Court held that a claim alleging that a State's reapportionment of its legislative districts violated the Equal Protection Clause by diluting the votes of one political party's members *was justiciable*. 478 U.S. at 113, 118–27, 106 S. Ct. 2797. In reaching this conclusion, the Court emphasized that "[t]he question here is the consistency of state action with the Federal Constitution," and that the plaintiffs' claim did not "ask the Court to enter upon policy determinations for which judicially manageable standards are lacking," since "[j]udicial standards under the Equal Protection Clause are well developed and familiar." *Id.* at 122, 106 S. Ct. 2797 (quoting *Baker v. Carr*, 369 U.S. 186, 226, 82 S. Ct. 691, 7 L.Ed.2d 663 (1962)).

Moreover, six Justices agreed that a plaintiff bringing a political gerrymandering claim under the Equal Protection Clause must "prove both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group." *Id.* at 127, 106 S. Ct. 2797 (plurality opinion); *id.* at 161, 106 S. Ct. 2797 (Powell, J., concurring in part and dissenting in part). The *Bandemer* majority

splintered, however, with respect to the contours of this standard. *Compare id.* at 127–43, 106 S. Ct. 2797 (plurality opinion), *with id.* at 161–85, 106 S. Ct. 2797 (Powell, J., concurring in part and dissenting in part).

The Supreme Court did not take up another political gerrymandering case for 18 years until it decided *Vieth*, and then it fractured again. In that case, the plaintiffs alleged that a State's revised map for its congressional districts "constituted a political gerrymander, in violation of Article I and the Equal Protection Clause." *Vieth*, 541 U.S. at 272, 124 S. Ct. 1769 (plurality opinion). All of the Justices appeared to accept that political gerrymandering, if sufficiently extreme, would violate the Constitution, *see, e.g.*, *id.* at 292–93, 124 S. Ct. 1769, but there remained a lack of consensus as to the appropriate standard for "determining when political gerrymandering has gone too far," *id.* at 296, 124 S. Ct. 1769. Considering and rejecting the various standards proposed by the plaintiffs and dissenting Justices, as well as the standards proposed by the plurality and the concurrence in *Bandemer*, a four-Justice plurality in Vieth "conclude[d] that neither Article I, § 2, nor the Equal Protection Clause, nor . . . Article I, § 4, provides a judicially enforceable limit on the political considerations that the States and Congress may take into account when districting," and therefore would have overruled *Bandemer*'s holding as to the justiciability of political gerrymandering claims. *Id.* at 305, 124 S. Ct. 1769. Providing the fifth vote for affirming the dismissal of the plaintiffs' claims, Justice Kennedy concurred in the judgment on the ground that, "in the case before us, we have no standard by which to measure the burden [that the plaintiffs] claim has been imposed on their representational rights." *Id.* at

313, 124 S. Ct. 1769 (Kennedy, J., concurring in the judgment). But he and the Court's four dissenters refused to join the plurality's conclusion that political gerrymandering claims under the Equal Protection Clause and Article I are necessarily nonjusticiable, declining to "foreclose all possibility of judicial relief if some limited and precise rationale were found to correct an established violation of the Constitution in some redistricting cases." *Id.* at 306, 124 S. Ct. 1769.

Justice Kennedy nonetheless agreed that the plurality had "demonstrate[d] the shortcomings of the . . . standards that [had] been considered to date." *Vieth*, 541 U.S. at 308, 124 S. Ct. 1769 (Kennedy, J., concurring in the judgment). There were, accordingly, five votes in *Vieth* for rejecting six distinct, albeit related, standards:

> *First*, the test proposed by the *Bandemer* plurality, which required a showing of an intent to discriminate plus proof that a political group had been "denied its chance to effectively influence the political process," *Bandemer*, 478 U.S. at 132–33, 106 S. Ct. 2797 (plurality opinion);
>
> *Second*, the standard proposed by Justice Powell's concurrence in *Bandemer*, which "focuse[d] on whether the boundaries of the voting districts have been distorted deliberately and arbitrarily to achieve illegitimate ends," as "determined by reference to . . . criteria that have independent relevance to the fairness of redistricting," *id.* at 165, 106 S. Ct. 2797 (Powell, J., concurring in part and dissenting in part);
>
> *Third*, the standard proposed by the *Vieth* plaintiffs, which would have required proof

that "the mapmakers acted with a predominant intent to achieve partisan advantage," as well as proof that the effect of the map was to "systematically 'pack' and 'crack' the rival party's voters" in such a way as to "thwart the plaintiffs' ability to translate a majority of votes into a majority of seats," *Vieth*, 541 U.S. at 284, 286–87, 124 S. Ct. 1769 (plurality opinion) (emphasis omitted);

Fourth, Justice Stevens' proposal in his *Vieth* dissent to "apply the standard set forth in [the Court's racial gerrymandering cases] and ask whether the legislature allowed partisan considerations to dominate and control the lines drawn, forsaking all neutral principles," *id.* at 339, 124 S. Ct. 1769 (Stevens, J., dissenting);

Fifth, a five-element prima facie test proposed by Justice Souter's *Vieth* dissent through which a plaintiff would show "that his State intentionally acted to dilute his vote, having ignored reasonable alternatives consistent with traditional districting principles" before "shift[ing] the burden to the defendants to justify their decision by reference to objectives other than naked partisan advantage," *id.* at 351, 124 S. Ct. 1769 (Souter, J., dissenting); and

Sixth, the standard proposed by Justice Breyer's *Vieth* dissent, which focused on whether "partisan manipulation" of district boundaries had been used "to entrench a minority in power," *id.* at 360, 124 S. Ct. 1769 (Breyer, J., dissenting).

The primary focus of all of these rejected standards, however, was determining when the use of political considerations in districting is so *unfair* as to violate *the Equal Protection Clause*.

The Court addressed political gerrymandering once more in *LULAC*, but again failed to agree on the standard that should apply. The Court there declined to revisit *Bandemer*'s justiciability holding, but five Justices, although unable to join a single opinion, agreed that the plaintiffs' theory—which focused on the mid-decennial nature of the redistricting at issue—failed to "offer the Court a manageable, reliable measure of fairness for determining whether a partisan gerrymander violates the Constitution." *LULAC*, 548 U.S. at 414, 126 S. Ct. 2594; *id.* at 492–93, 126 S. Ct. 2594 (Roberts, C.J., concurring in part, concurring in the judgment in part, and dissenting in part); *id.* at 511–12, 126 S. Ct. 2594 (Scalia, J., concurring in the judgment in part and dissenting in part).

Taken together, the combined effect of *Bandemer*, *Vieth*, and *LULAC* is that, while political gerrymandering claims premised on the *Equal Protection Clause* remain justiciable in theory, it is presently unclear whether an adequate standard to assess such claims will emerge.

But the inability of the Supreme Court thus far to agree on a standard for adjudicating political gerrymandering claims brought under the Equal Protection Clause does not necessarily doom a claim that the State's abuse of political considerations in districting has violated any other constitutional provision. *See Vieth*, 541 U.S. at 294, 124 S. Ct. 1769 (plurality opinion) ("It is elementary that scrutiny levels are claim specific. An action that triggers a heightened level of scrutiny for one claim may receive a

very different level of scrutiny for a different claim because the underlying rights, and consequently constitutional harms, are not comparable"). Indeed, in this very case, the Supreme Court recognized that the plaintiffs' legal theory— which is premised on the First Amendment rather than the Equal Protection Clause—was "uncontradicted by the majority in any of [its] cases." *Shapiro*, 136 S. Ct. at 456. We therefore turn to the limitations that the First Amendment may impose on a State's redistricting.

III

Like the Equal Protection Clause, the First Amendment also operates to limit the conduct of state actors. *See Murdock v. Pennsylvania*, 319 U.S. 105, 108, 63 S. Ct. 870, 87 L.Ed. 1292 (1943) (recognizing that the Fourteenth Amendment makes the First Amendment "applicable to the states"). "[P]olitical belief and association constitute the core of those activities protected by the First Amendment." *Elrod v. Burns*, 427 U.S. 347, 356, 96 S. Ct. 2673, 49 L.Ed.2d 547 (1976) (plurality opinion). Similarly, "[t]he right to vote freely for the candidate of one's choice is of the essence of a democratic society." *Reynolds*, 377 U.S. at 555, 84 S. Ct. 1362.

In addition to these forms of *direct* expression, moreover, the First Amendment also works in tandem with other constitutional guarantees to protect *representational* rights. Indeed, "*[t]he right of qualified voters, regardless of their political persuasion, to cast their votes effectively . . . rank[s] among our most precious freedoms.*" *Anderson v. Celebrezze*, 460 U.S. 780, 787, 103 S. Ct. 1564, 75 L.Ed.2d 547 (1983) (emphasis added) (quoting *Williams v. Rhodes*, 393 U.S. 23, 30–31, 89 S. Ct. 5, 21 L.Ed.2d 24 (1968)).

Expounding on the significance of this "representational right," the Supreme Court has explained:

> [R]epresentative government is in essence self-government through the medium of elected representatives of the people, and each and every citizen has an inalienable right to full and effective participation in th[is] political process[ ] . . . . Most citizens can achieve this participation only as qualified voters through the election of legislators to represent them. *Full and effective participation by all citizens . . . requires, therefore, that each citizen have an equally effective voice in the election of [a representative].*

Reynolds, 377 U.S. at 565, 84 S. Ct. 1362(emphasis added). Similarly, the Court in *Wesberry* recognized that Article I, § 2, of the Constitution requires "that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's." 376 U.S. at 7–8, 84 S. Ct. 526.

Thus, at the most basic level, when a State draws the boundaries of its electoral districts so as to dilute the votes of certain of its citizens, the practice imposes a burden on those citizens' right to "have an equally effective voice in the election" of a legislator to represent them. *Reynolds*, 377 U.S. at 565, 84 S. Ct. 1362. In particular, the requirement of Article I, § 2, that one person's vote in a congressional election "is to be worth as much as another's," *Wesberry*, 376 U.S. at 7, 84 S. Ct. 526, provides the premise for recognizing vote "dilution" as a burden on citizens' representational rights, since dilution compromises the equal value requirement. The Supreme Court has already recognized this basic principle in the context of districts of unequal population. *See, e.g., Bd. of Esti-*

mate of City of New York v. Morris, 489 U.S. 688, 693–94, 109 S. Ct. 1433, 103 L.Ed.2d 717 (1989) ("If districts of widely unequal population elect an equal number of representatives, the voting power of each citizen in the larger constituencies is debased and the citizens in those districts have a smaller share of representation than do those in the smaller districts"). Thus, while a State can dilute the value of a citizen's vote by placing him in an overpopulated district, a State can also dilute the value of his vote by placing him in a particular district because he will be outnumbered there by those who have affiliated with a rival political party. In each case, the weight of the viewpoint communicated by his vote is "debased." *Morris*, 489 U.S. at 693–94, 109 S. Ct. 1433. And, because, in our political system, "voters can assert their preferences only through candidates or parties or both," *Anderson*, 460 U.S. at 787, 103 S. Ct. 1564, the devaluation of a citizen's vote by dilution implicates the representational right protected by the First Amendment and Article I, § 2.

The practice of *purposefully* diluting the weight of certain citizens' votes to make it more difficult for them to achieve electoral success *because of* the political views they have expressed through their voting histories and party affiliations thus infringes this representational right. *See Vieth*, 541 U.S. at 314–15, 124 S. Ct. 1769 (Kennedy, J., concurring in the judgment). It penalizes voters for expressing certain preferences, while, at the same time, rewarding other voters for expressing the opposite preferences. In this way, the practice implicates the First Amendment's well-established prohibition against retaliation, which prevents the State from indirectly impinging on the direct rights of speech and association by retaliating against citizens for their exercise. *See*

Hartman v. Moore, 547 U.S. 250, 256, 126 S. Ct. 1695, 164 L.Ed.2d 441 (2006) ("Official reprisal for protected speech 'offends the Constitution [because] it threatens to inhibit exercise of the protected right,' and the law is settled that as a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions . . . for speaking out" (quoting *Crawford–El v. Britton*, 523 U.S. 574, 588 n. 10, 118 S. Ct. 1584, 140 L.Ed.2d 759 (1998))); *see also Rutan*, 497 U.S. at 77–78, 110 S. Ct. 2729 ("What the First Amendment precludes the government from commanding directly, it also precludes the government from accomplishing indirectly"). Thus, under the First Amendment's retaliation prohibition, the government may neither penalize a citizen nor deprive him of a benefit because of his constitutionally protected speech and conduct. *See Rutan*, 497 U.S. at 74–76, 110 S. Ct. 2729; *Perry v. Sindermann*, 408 U.S. 593, 597, 92 S. Ct. 2694, 33 L.Ed.2d 570 (1972). Accordingly, the well-established standards for evaluating ordinary First Amendment retaliation claims can also be used for evaluating claims arising in the redistricting context.

A plaintiff bringing a garden variety retaliation claim under the First Amendment must prove that the responsible official or officials were motivated by a desire to retaliate against him because of his speech or other conduct protected by the First Amendment and that their retaliatory animus caused the plaintiff's injury. *See Hartman*, 547 U.S. at 260, 126 S. Ct. 1695 (recognizing that "any . . . plaintiff charging official retaliatory action . . . must prove the elements of retaliatory animus as the cause of injury").

With respect to the causation element, a retaliation claim requires proof of "but-for causation" or a showing that "the adverse action would not have been taken" but for the officials' retaliatory motive. *Hartman*, 547 U.S. at 260, 126 S. Ct. 1695. For while "[i]t may be dishonorable to act with an unconstitutional motive and perhaps in some instances be unlawful, . . . action colored by some degree of bad motive does not amount to a constitutional tort if that action would have been taken anyway." *Id.*; *see also id.* at 256, 126 S. Ct. 1695 ("Some official actions adverse to . . . a speaker might well be unexceptional if taken on other grounds, but when nonretaliatory grounds are in fact insufficient to provoke the adverse consequences, we have held that retaliation is . . . the but-for cause of official action offending the Constitution").

As for the injury element, the plaintiff must prove that government officials "took some action that adversely affected her First Amendment rights." *Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 499 (4th Cir. 2005). The nature of the harm necessary to support a retaliation claim varies depending on the surrounding factual circumstances. *See Thaddeus–X v. Blatter*, 175 F.3d 378, 397 (6th Cir.1999) ("[T]he definition of adverse action is not static across contexts"). It is clear, however, that "the retaliatory acts committed by a [government official must] be more than *de minimis* or trivial," *Suarez Corp. Indus. v. McGraw*, 202 F.3d 676, 686 (4th Cir.2000), and that "[h]urt feelings or a bruised ego are not by themselves the stuff of constitutional tort," *Zherka v. Amicone*, 634 F.3d 642, 645–46 (2d Cir.2011). Rather, some concrete harm [must be] alleged and specified," *id.* at 646, and that harm must be sufficiently serious that it "would likely de-

ter a person of ordinary firmness from the exercise of First Amendment rights," *Constantine*, 411 F.3d at 500 (internal quotation marks and citation omitted).

Because there is no redistricting exception to this well-established First Amendment jurisprudence, the fundamental principle that the government may not penalize citizens because of how they have exercised their First Amendment rights thus provides a well-understood structure for claims challenging the constitutionality of a State's redistricting legislation—a discernable and manageable standard.

When applying First Amendment jurisprudence to redistricting, we conclude that, to state a claim, the plaintiff must allege that those responsible for the map redrew the lines of his district with the *specific intent* to impose a burden on him and similarly situated citizens because of how they voted or the political party with which they were affiliated. In the context of redistricting, this burden is the *injury* that usually takes the form of *vote dilution*. But vote dilution is a matter of degree, and a *de minimis* amount of vote dilution, even if intentionally imposed, may not result in a sufficiently adverse effect on the exercise of First Amendment rights to constitute a cognizable injury. Instead, to establish the injury element of a retaliation claim, the plaintiff must show that the challenged map diluted the votes of the targeted citizens to such a degree that it resulted in a tangible and concrete adverse effect. In other words, the vote dilution must make some practical difference. Finally, the plaintiff must allege *causation*—that, absent the mapmakers' intent to burden a particular group of voters by reason of their views, the concrete adverse impact would not have occurred.

When a plaintiff adequately alleges the three elements of intent, injury, and causation, as described above, he states a plausible claim that a redistricting map violates the First Amendment and Article I, § 2. Of course, as consistent with First Amendment jurisprudence, the State can still avoid liability by showing that its redistricting legislation was narrowly tailored to achieve a compelling government interest. *See Elrod*, 427 U.S. at 362, 96 S. Ct. 2673 ("It is firmly established that a significant impairment of First Amendment rights must survive exacting scrutiny").

This standard contains several important limitations that help ensure that courts will not needlessly intervene in what is quintessentially a political process. *First*, it does not prohibit a legislature from taking *any* political consideration into account in reshaping its electoral districts. A legislature and its mapmakers may, for example, still use data reflecting prior voting patterns to advance legitimate districting considerations, including the maintenance of "communities of interest," *LULAC*, 548 U.S. at 433, 126 S. Ct. 2594 (citation omitted), and even the "protection of incumbents of all parties," *Vieth*, 541 U.S. at 284, 124 S. Ct. 1769 (plurality opinion). Rather, what implicates the First Amendment's prohibition on retaliation is not the use of data reflecting citizens' voting history and party affiliation, but the use of such data for the purpose of making it harder for a particular group of voters to achieve electoral success because of the views they had previously expressed. *See Vieth*, 541 U.S. at 315, 124 S. Ct. 1769 (Kennedy, J., concurring in the judgment) ("[T]he First Amendment analysis . . . is not whether political classifications were used. The inquiry instead is

whether political classifications were used to burden a group's representational rights").

Second, a plaintiff must rely on objective evidence to prove that, in redrawing a district's boundaries, the legislature and its mapmakers were motivated by a specific intent to burden the supporters of a particular political party. It stands to reason "that whenever a legislature redistricts, those responsible for the legislation will know the likely political composition of the new districts and will have a prediction as to whether a particular district is a safe one for a Democratic or Republican candidate or is a competitive district that either candidate might win." *Bandemer*, 478 U.S. at 128, 106 S. Ct. 2797 (plurality opinion). But merely proving that the legislature was aware of the likely political impact of its plan and nonetheless adopted it is not sufficient to prove that the legislature was motivated by the type of intent necessary to sustain a First Amendment retaliation claim. Rather, the plaintiff must produce objective evidence, either direct or circumstantial, that the legislature specifically intended to burden the representational rights of certain citizens because of how they had voted in the past and the political party with which they had affiliated.

Third, the standard requires proof that the vote dilution brought about by the redistricting legislation was sufficiently serious to produce a demonstrable and concrete adverse effect on a group of voters' right to have "an equally effective voice in the election" of a representative. *Reynolds*, 377 U.S. at 565, 84 S. Ct. 1362. Not only is this requirement of a palpable and concrete harm indicated by First Amendment retaliation jurisprudence, but it also makes common sense. Legislators draw political gerrymanders for

practical reasons, and it is fitting to measure the effect of the apportionment not by whether it crosses some arbitrary statistical threshold or offends some vague notion of fairness, but by its real-world consequences— including, most notably, whether the State's intentional dilution of the weight of certain citizens' vote by reason of their views has actually altered the outcome of an election.

The State argues against the First Amendment standard, maintaining that the standard is "arbitrary in the sense that the previous district becomes the norm or baseline against which the fairness of the new district is to be measured" when, in reality, citizens' voting patterns are dynamic. But its argument fails to account for the necessary elements of a First Amendment retaliation claim. The retaliation jurisprudence does not, as the State implies, include a presumption of fairness of the status quo ante. The prior district itself may well have been drawn for partisan reasons, and the State can redraw its boundaries for any number of reasons. But it cannot do so to retaliate against one group for its past electoral success in that district.

The State also argues that "no individual has a constitutional right to vote in a district that is safe or competitive for that individual's preferred candidates, even where the district has been so in the past." While that may be true, it is also beside the point. As the Supreme Court has explained in the political patronage context,

> [E]ven though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, *there are some reasons upon which the government*

> *may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech.* For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited.

Rutan, 497 U.S. at 72, 110 S. Ct. 2729 (quoting *Perry*, 408 U.S. at 597, 92 S. Ct. 2694). This basic principle applies with equal force in the redistricting context. While citizens have no right to be assigned to a district that is likely to elect a representative that shares their views, the State also may not intentionally drown out the voices of certain voters by reason of their views. And when a State is alleged to have not only intentionally but also successfully burdened "the right of qualified voters, regardless of their political persuasion, to cast their votes effectively," *Anderson*, 460 U.S. at 787, 103 S. Ct. 1564 (quoting *Williams*, 393 U.S. at 30, 89 S. Ct. 5), by diluting their votes in a manner that has manifested in a concrete way, the allegation supports a justiciable claim under the First Amendment and Article I, § 2.

In sum, we recognize the justiciability of a claim challenging redistricting under the First Amendment and Article I, § 2, when it alleges intent, injury, and causation, as described herein.

IV

With this standard in hand, we assess the plaintiffs' second amended complaint, accepting the pleaded facts as true, to determine whether it states a plausible claim upon which relief can be granted. *See* Fed. R. Civ. P. 12(b)(6).

The complaint alleges that, prior to the 2011 redistricting, Maryland's Sixth Congressional District had been "represented for nearly 20 years by Republican Roscoe Bartlett, who won reelection in 2010 by a 28-point margin." Second Am. Compl. ¶ 78. But, according to the complaint, the State's Democratic Governor and its Democratic-controlled legislature "set out to crack the [Sixth] District . . . to prevent voters in that district from [continuing to] elect[ ] a Republican representative to Congress," *id.* ¶ 38, a goal openly admitted by members of the Advisory Committee and various legislators, *see id.* ¶¶ 95-100. The complaint alleges that, without the input or support of any of the State's Republican leaders, and even though only "relatively small adjustments [were] needed to accommodate population growth," *id.* ¶ 61, the State adopted a redistricting plan that radically redrew the Sixth District's lines, "removing over 360,000 residents from the mostly-Republican northern counties of the district and adding nearly 350,000 residents from predominantly Democratic and urban Montgomery County," *id.* ¶ 81. It alleges that, relying on data reflecting citizens' voting histories and party registrations, "the Plan accomplished a net transfer of over 65,000 Republican voters out of the district and over 30,000 Democratic voters into the district," *id.* ¶ 84, thereby altering the balance of power between the two major political parties. The complaint alleges further that the mapmakers' effort was successful insofar as the Sixth District "was flipped by the Plan from Republican to Democratic control" in the 2012 congressional election; "[t]he district remained under Democratic control after the 2014 congressional election"; and the district "is nearly certain to remain [under Democratic control]

in all future congressional elections under the Plan." *Id.* ¶ 4.

These factual allegations adequately state intent, injury, and causation and therefore support a plausible claim that the State's redrawing of the Sixth District's lines violated the plaintiffs' rights under the First Amendment and Article I, § 2. *First*, the plaintiffs have alleged that they were registered Republicans who voted for Republican candidates in the Sixth District prior to 2011. *Second*, they have alleged that "the Maryland legislature expressly and deliberately considered Republican voters' protected First Amendment conduct, including their voting histories and political party affiliations, when it redrew the lines of the [Sixth] Congressional District; *and it did so with an intent to disfavor and punish those voters by reason of their constitutionally protected conduct.*" Second Am. Compl. ¶ 7(a) (emphasis added). *Third*, the plaintiffs have alleged that, precisely as intended, the "actual effect" of the Plan has been to "burden[ ] Republican voters in the former [Sixth] Congressional District" by "preventing [them] from continuing to elect a Republican representative to the United States House of Representatives, as they had in the prior ten congressional elections." *Id.* ¶ 7(b). And *fourth and finally*, the plaintiffs have adequately alleged the causation element of a retaliation claim: they have alleged (1) that the State's redrawing of the Sixth District "cannot be explained or justified by reference to Maryland's geography or other legitimate redistricting criteria" and therefore that "the cracking of the [Sixth] District would not have taken place without the legislature's [deliberate] targeting of Republican voters on the basis of their First-Amendment-protected conduct," *id.* ¶ 120-21; and (2) that "but for the cracking of the district

under the Plan," "Republican voters in the former [Sixth] District would have been able to elect a Republican representative in 2012 and 2014," *id.* ¶ 7(b). If the plaintiffs succeed in proving these allegations, they will be entitled to relief, unless the State can establish that the drawing of the Sixth District's lines was narrowly tailored to advance a compelling government interest.

Accordingly, the State's motion to dismiss the plaintiff's complaint for failure to state a justiciable claim is DENIED.

BREDAR, District Judge, dissenting:

I respectfully dissent: I would grant Defendants' motion to dismiss (ECF No. 51).[1]

I begin by emphasizing what this opinion does *not* stand for. This opinion is not a defense of the State's authority to segregate voters by political affiliation so as to achieve pure partisan ends: such con-

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[1] In 2014, I presided over this matter while sitting as a single-judge court. Addressing Plaintiffs' claims as initially framed, I found the allegations wanting under the familiar *Twombly/Iqbal* standard, and—following then-controlling Fourth Circuit precedent—I both denied Plaintiffs access to a three-judge court and dismissed the case. *See Benisek v. Mack*, 11 F. Supp. 3d 516 (D.Md.2014). These two rulings were summarily affirmed by the Fourth Circuit. *See Benisek v. Mack*, 584 Fed. Appx. 140 (4th Cir.2014) (mem.). However, the Supreme Court of the United States later reversed the first ruling, holding that the Fourth Circuit had set too high a bar for access to three-judge district courts under 28 U.S.C. § 2284. The Supreme Court explained that the Fourth Circuit erred in *Duckworth v. State Administration Board of Election Laws*, 332 F.3d 769, 773 (4th Cir.2003), in which case the Fourth Circuit had determined that, where a redistricting complainant fails to state a claim, by definition the complainant's pleadings are constitutionally insubstantial and "so properly are subject to dismissal by the district court without convening a three-judge court." *See Shapiro v. McManus*, —— U.S. ——, 136 S. Ct. 450, 455, 193 L.Ed.2d 279 (2015) ("We think [the *Duckworth*] standard both too demanding and inconsistent with our precedents. '[C]onstitutional claims will not lightly be found insubstantial for purposes of the three-judge-court statute." (alteration in original) (citation omitted)). Without "expressing any view on the merits" of Plaintiffs' claims, *id.* at 456, the Supreme Court remanded the case for proceedings before a three-judge district court. On remand, Plaintiffs sought—and received—this Court's permission to amend their Complaint substantially, and it is Plaintiffs' modified constitutional theory that now confronts the Court.

duct is noxious and has no place in a representative democracy. *See Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, —— U.S. ——, 135 S. Ct. 2652, 2658, 192 L.Ed.2d 704 (2015) (" '[P]artisan gerrymanders,' this Court has recognized, '[are incompatible] with democratic principles.' " (alterations in original) (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 292, 124 S. Ct. 1769, 158 L.Ed.2d 546 (2004) (plurality opinion))). Nor do I seek in this opinion to understate the prevalence of political gerrymandering: there is no doubt in my mind that the problem is real and widespread and that entrenched Democratic and Republican state legislatures alike exercise their control over redistricting in an effort to promote party power. *See* Michael J. Kasper, *The Almost Rise and Not Quite Fall of the Political Gerrymander*, 27 N. Ill. U. L. Rev. 409, 419-23 (2007) (recounting the history of both Democratic and Republican gerrymandering efforts in Texas). Further, this opinion should not be read as a willing abdication of the judiciary's constitutional obligation to resolve cases and controversies, see U.S. Const. art. III, § 2, cl. 1, even when those cases and controversies involve politically charged subject matter. I have studied Plaintiffs' allegations and, in particular, their proposed First Amendment framework for resolving political gerrymandering claims. I accept, for purposes of this discussion, that the First Amendment may, as Justice Kennedy opined in *Vieth*, be the most "relevant constitutional provision in . . . cases that allege unconstitutional partisan gerrymandering," 541 U.S. at 314, 124 S. Ct. 1769 (Kennedy, J., concurring in the judgment). I also assume, as I must on a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, that Plaintiffs' well-pleaded factual allegations are true: accordingly, I take as a

given that the Maryland Governor's Redistricting Advisory Committee ("GRAC") "focused predominantly on the voting histories and political-party affiliations of the citizens of the State" with the "clear purpose and effect of diluting the votes of Republican voters and preventing them from electing their preferred representatives in Congress." (ECF No. 44 ¶ 6.)

But even accepting that the First Amendment supplies the relevant constitutional principle, and even assuming that official misconduct may be afoot on the discrete facts of this case, I cannot responsibly endorse Plaintiffs' proposed standard (or otherwise approve continued litigation in this matter) unless I first conclude that the standard would be viable and manageable *throughout the life* of this case and *beyond the facts* of this case. Two substantial hurdles prevent me from drawing such a conclusion. The first hurdle relates to precedent: the Supreme Court has expressed some degree of tolerance for partisanship in the districting context, but that tolerance creates intractable line-drawing problems. A *per se* rule flatly prohibiting state legislatures from taking account of voting history or voter affiliation in their mapmaking would streamline the preliminary analysis, but it is not clear that such a rule is available in light of controlling law (or desirable in light of competing interests and objectives).

Even were this Court to implement such *per se* rule, there remains a second, insurmountable barrier. Courts are simply not equipped to ascertain those unusual circumstances in which redistricting inflicts an actual, measurable burden on voters' representational rights. Yet that is precisely what the Supreme Court has required. *Compare Davis v. Bandemer*,

478 U.S. 109, 127, 106 S. Ct. 2797, 92 L.Ed.2d 85 (1986) (plurality opinion) ("We . . . agree . . . that in order to succeed the . . . plaintiffs were required to prove both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group."), *and Vieth*, 541 U.S. at 295, 124 S. Ct. 1769 (plurality opinion) ("This Court may not willy-nilly apply standards—even manageable standards— having no relation to constitutional harms."), *with League of United Latin Am. Citizens [LULAC] v. Perry*, 548 U.S. 399, 418, 126 S. Ct. 2594, 165 L.Ed.2d 609 2006) (Kennedy, J.) ("[A] successful claim attempting to identify unconstitutional acts of partisan gerrymandering must . . . show a burden, as measured by a reliable standard, on the complainants' representational rights."). Courts cannot reliably distinguish between what Plaintiffs would term impermissible "vote dilution" and the ordinary consequences of an American political process that is organic, fluid, and often unpredictable.

Constitutional adjudication in the federal courts (and particularly adjudication that has the potential to disrupt democratic process and delegitimize democratically elected officials) must not be inconsistent or *ad hoc* but must instead be "principled, rational, and based upon reasoned distinctions," *Vieth*, 541 U.S. at 278, 124 S. Ct. 1769 (plurality opinion). Because Plaintiffs have not shown that their framework would reliably identify those circumstances in which voters' representational rights have been impermissibly burdened, and because I have been unable to discern an acceptable alternative framework, I conclude that Plaintiffs' claims are not justiciable.[2]

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[2] While the majority is quite correct in its observation, *supra* at 594, that Justice Kennedy's First Amendment theory remains

Accordingly, I would now dismiss Plaintiffs' controlling Second Amended Complaint with prejudice. Because I conclude that Plaintiffs' claims can *never* succeed, I would spare the parties the significant expense of discovery and end this case now. Offensive as political gerrymandering may be, there is nothing to be gained (and much to be lost) in postponing the inevitable.

I. Partisanship and Precedent

Before a court can craft a principled standard for rectifying a harm, it must grasp precisely what harm it is trying to rectify. Political gerrymandering claims have left courts in a quagmire because, on the one hand, courts recognize that districting is among the most inherently political ventures that state legislatures (and their agents) undertake; on the other hand, it goes without saying that the party in power has every incentive to design and implement a map that further entrenches its power. I am persuaded that *if* courts are to have any role in policing this process (an open question as far as I, and, it would seem, a majority of the Justices of the Supreme Court are concerned[3]), courts must depart from am-

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"uncontradicted by the majority in any [Supreme Court] cases," *Shapiro*, 136 S. Ct. at 456, it does not follow, as the majority suggests, that Plaintiffs' Second Amended Complaint "adequately employs First Amendment jurisprudence to state a plausible claim for relief." As will be seen, Plaintiffs have failed to state a claim because they, like so many complainants in redistricting cases, have failed to proffer either a reliable standard for measuring the burden of political gerrymandering or allegations on which the Court could construct such a standard.

[3] There is much discussion in the case law and the scholarly literature about the meaning of *Vieth*, and in particular the meaning of Justice Kennedy's controlling opinion. While Justice Kennedy apparently remains open to the possibility that politi-

biguous precedent and hold, as a first principle, that *any* manipulation on the basis of protected First Amendment conduct is presumptively impermissible. Under such a regime, if mapmakers were to take account of protected conduct in their districting, and if voters could thereafter point to actual, measurable harms flowing from such districting, the resulting maps would be invalid (or subject to the rigors of strict scrutiny that is, more often than not, fatal in fact).

To be clear, I am not proposing that courts *should* adopt such a *per se* rule: there are competing interests at stake, and indeed a rule that would preclude the kind of nefarious viewpoint discrimination Plaintiffs describe in their Second Amended Complaint might very well sweep up neutral or even useful political considerations. In a recent dissenting opinion in a malapportionment and racial gerryman-

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cal gerrymandering claims may be justiciable, he did not opine that they necessarily *are* justiciable. On the contrary, he acknowledged that there are "weighty arguments for holding cases like these to be *nonjusticiable*" and that "those arguments may prevail in the long run." 541 U.S. 267, 309, 124 S. Ct. 1769, 158 L.Ed.2d 546 (2004) (Kennedy, J., concurring in the judgment) (emphasis added). Justice Kennedy further opined that the "failings of the many proposed standards for measuring the burden a gerrymander imposes on representational rights make [judicial] intervention improper," though he suggested that if "workable standards do emerge to measure these burdens," courts should stand ready to order relief. *Id.* at 317, 124 S. Ct. 1769. The most that should be said, then, about Justice Kennedy's take on the justiciability of political gerrymandering claims, is that he has not absolutely ruled it out. Perhaps equally plausible is Justice Scalia's read of the Kennedy opinion, *i.e.*, that lower courts should treat the opinion as a "reluctant fifth vote against justiciability," a vote that "may change in some future case but that holds, for the time being, that this matter is nonjusticiable," *id.* at 305, 124 S. Ct. 1769 (plurality opinion).

dering case, Judge Diana Gribbon Motz of the Fourth Circuit described those political or quasi-political districting criteria that the Supreme Court has deemed legitimate, which include maintaining the competitive balance among political parties; avoiding contests between incumbents, provided that incumbents of one party are not treated more favorably than those of another; and preserving communities of interest. *See Raleigh Wake Citizens Ass'n v. Wake Cty. Bd. of Elections*, No. 16–1270, 827 F.3d 333, 354–55, 2016 WL 3568147, at *16 (4th Cir. July 1, 2016) (Motz, J., dissenting).

For present purposes, I am simply asserting that *if* courts are going to adjudicate or attempt to adjudicate political gerrymandering claims, they must begin with the proposition that mapmakers may not take account of First Amendment–protected conduct when drawing district lines. The problem, of course, is that I am not writing on a blank slate: even those Justices of the Supreme Court who have remained optimistic about the justiciability of political gerrymandering claims have nevertheless acknowledged the partisan realities of districting. *Vieth* is illustrative: while the decision was highly fragmented, each opinion can be read to include some recognition that partisanship in districting may be inevitable, if perhaps suboptimal. *See* 541 U.S. at 285–86, 124 S. Ct. 1769 (plurality opinion) (observing that the "Constitution clearly contemplates districting by political entities, and unsurprisingly that turns out to be root-and-branch a matter of politics"; further describing partisan motives as "ordinary and lawful" (citations omitted)); *id.* at 307, 124 S. Ct. 1769 (Kennedy, J., concurring in the judgment) (explaining that whereas race is an "impermissible classification," politics is "quite a different matter," and agreeing that it would

be "idle . . . to contend that any political consideration taken into account in fashioning a reapportionment plan is sufficient to invalidate it" (citation omitted)); *id.* at 336, 124 S. Ct. 1769 (Stevens, J., dissenting) (explaining that "[j]ust as race can be a factor in, but cannot dictate the outcome of, the districting process, so too can partisanship be a permissible consideration in drawing district lines, so long as it does not predominate"); *id.* at 343, 124 S. Ct. 1769 (Souter, J., dissenting) (acknowledging that "some intent to gain political advantage is inescapable whenever political bodies devise a district plan, and some effect results from the intent"); *id.* at 355, 124 S. Ct. 1769 (Breyer, J., dissenting) (opining that "pure politics often helps to secure constitutionally important democratic objectives"). The Court has echoed this tolerance for partisanship in other cases and in related contexts, such as in its racial gerrymandering and malapportionment jurisprudence. *See, e.g., Miller v. Johnson*, 515 U.S. 900, 914, 115 S. Ct. 2475, 132 L.Ed.2d 762 (1995) ("It is true that redistricting in most cases will implicate a political calculus in which various interests compete for recognition . . . . "); *Shaw v. Reno*, 509 U.S. 630, 662–63, 113 S. Ct. 2816, 125 L.Ed.2d 511 (1993) (White, J., dissenting) ("Because districting inevitably is the expression of interest group politics, and because 'the power to influence the political process is not limited to winning elections,' the question in gerrymandering cases is 'whether a particular group has been unconstitutionally denied its chance to effectively influence the political process.' " (citations omitted)); *Gaffney v. Cummings*, 412 U.S. 735, 753, 93 S. Ct. 2321, 37 L.Ed.2d 298 (1973) ("Politics and political considerations are inseparable from districting and apportionment . . . . The reality is that districting in-

evitably has and is intended to have substantial political consequences."); *cf. Harris v. Ariz. Indep. Redistricting Comm'n*, —— U.S. ——, 136 S. Ct. 1301, 1310, 194 L.Ed.2d 497 (2016) (assuming but nevertheless reserving the question whether partisanship is an "illegitimate redistricting factor").

In light of this authority, lower courts may be precluded from implementing a *per se* bar on partisan considerations in districting. That said, the Supreme Court may have been more willing to tolerate partisanship in weighing the merits of equal protection claims because, as Justice Kennedy observed, "[n]o substantive definition of fairness in districting seems to command general assent," *Vieth*, 541 U.S. at 307, 124 S. Ct. 1769 (Kennedy, J., concurring in the judgment). The Court has never held that discernible political groups are entitled to proportional representation under the Fourteenth Amendment. Conversely, the First Amendment right is a sacrosanct individual right, and the Court has recognized that targeting on the basis of political viewpoint or affiliation *outside* the redistricting context presumptively violates the First Amendment. *See id.* at 294, 124 S. Ct. 1769 (plurality opinion) ("[A] First Amendment claim, if it were sustained, would render unlawful all consideration of political affiliation in districting, just as it renders unlawful all consideration of political affiliation in hiring for non-policy-level government jobs." (citing *Elrod v. Burns*, 427 U.S. 347, 96 S. Ct. 2673, 49 L.Ed.2d 547 (1976))). To date, the First Amendment framework in the redistricting context is nothing more (or less) than a "legal theory put forward by a Justice of th[e] Court and uncontradicted by the majority in any . . . cases," *Shapiro v. McManus*, —— U.S. ——, 136 S. Ct. 450, 456, 193 L.Ed.2d 279 (2015). Unless and until a ma-

jority of Justices squarely confront the propriety of partisanship in reviewing a redistricting claim brought on First Amendment grounds, it may be possible for lower courts to implement a *per se* rule in this narrow context. *Cf. Vieth*, 541 U.S. at 294, 124 S. Ct. 1769 (plurality opinion) ("It is elementary that scrutiny levels are claim specific. An action that triggers a heightened level of scrutiny for one claim may receive a very different level of scrutiny for a different claim because the underlying rights, and consequently constitutional harms, are not comparable. To say that suppression of political speech . . . triggers strict scrutiny is not to say that failure to give political groups equal representation . . . triggers strict scrutiny.").

This discussion is not strictly academic. To accept that political manipulation is part and parcel of redistricting is to create an insuperable line-drawing problem: how much politicking is too much, and how do we know? From *Bandemer* to the present day, the Supreme Court has been unable to answer that question with anything resembling the degree of clarity lower courts require in order to fairly adjudicate political gerrymandering claims. But if courts were to accept the premise that state authorities may no more use voter history and affiliation for mapmaking than they may use such data for hiring, firing, and contracting decisions, then courts would have, if nothing else, at least a plausible foundation on which to attempt to construct a standard.

Ultimately, I need not resolve this matter. Even were the Court to adopt a *per se* rule forbidding partisan manipulation in districting, I would nevertheless conclude that it is infeasible to ascertain the point at which voter manipulation produces a cog-

nizable injury the likes of which courts are equipped to redress. If there is no provable burden, then there can be no judicial relief. *See id.* at 292, 124 S. Ct. 1769 ("The issue . . . is not whether severe partisan gerrymanders violate the Constitution, but whether it is for the courts to say when a violation has occurred, and to design a remedy.").

II. Burden

Defendants in this case devoted much of their briefing—and a substantial portion of their oral argument—to pressing their contention that nothing about the GRAC's 2011 map chills voters' First Amendment rights: voters remain free to affiliate with the party of their choice, to vote, to run for office if they wish, and to participate in vibrant political debate wherever they find themselves. Candidly, I made a similar observation in dismissing Plaintiffs' original Complaint, *see Benisek v. Mack*, 11 F. Supp. 3d 516, 526 (D.Md.2014), *aff'd*, 584 Fed.Appx. 140 (4th Cir.2014) (per curiam), *rev'd and remanded sub nom. Shapiro*, 136 S. Ct. 450. Since that time, Plaintiffs' theory of the case has evolved, and they now contend that the burden they (along with other Maryland voters) have suffered is not a direct restraint on their political activity but rather an indirect sanction for engaging in First Amendment–protected conduct. According to Plaintiffs, by consulting data on voting history and party affiliation and by strategically deploying that data in its mapmaking, the GRAC "diluted the votes of the minority party significantly enough that the dilution has inflicted a palpable and concrete adverse effect" (ECF No. 85 at 3) through the cracking of the 6th Congressional District.

For purposes of this discussion, I accept that the burden Plaintiffs allege they have suffered is an indirect burden and that, accordingly, much of Defendants' argument misses the mark. Likewise, much of the discussion in prior cases in which district courts have applied First Amendment principles in resolving political gerrymandering claims is only marginally relevant to the Court's analysis here: while plaintiffs in those prior cases have occasionally pleaded an indirect burden, presiding courts have generally focused on the absence of a direct restraint. *But see Radogno v. Ill. State Bd. of Elections*, No. 1:11– cv–04884, 2011 WL 5025251, at *7 (N.D.Ill. Oct. 21, 2011) ("It may very well be that Plaintiffs' ability to *successfully elect* their preferred candidate is burdened by the redistricting plan, but that has nothing to do with their First Amendment rights."); *Kidd v. Cox*, No. 1:06–CV–0997–BBM, 2006 WL 1341302, at *19 (N.D.Ga. May 16, 2006) ("What Plaintiffs demand is the right to have their views represented in state government by the representative of their choice. We decline to recognize such a right under the First Amendment.").

Nevertheless, even assuming that vote dilution (as Plaintiffs conceive of it) may amount to a constitutional harm,[4] I conclude that it is not a harm

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[4] This, however, remains an open question: while malapportionment plainly harms the rights of those particular voters who are packed into overcrowded districts and whose votes are thereby literally diluted, it is less obvious that voters suffer individual harm simply because they are redistricted in such a way that their party of choice is less likely to prevail in congressional elections. Indeed, as Plaintiffs here seem to recognize, and as the majority acknowledges, *supra* at 591, "citizens have no *constitutional* right to reside in a district in which a majority of the population shares their political views and is

courts are currently equipped to redress: I can ascertain no reliable, administrable standard, and Plaintiffs have proposed none, for distinguishing electoral outcomes achieved through political gerrymandering from electoral outcomes determined by the natural ebb and flow of politics. Short of exposing voters and their private voting decisions to involuntary interrogative discovery—an obviously impractical and fundamentally undemocratic undertaking—it is simply not feasible to reverse-engineer elections so as to determine whether the State's dilutive efforts imposed a "real and concrete adverse impact on supporters of the disfavored political party" (ECF No. 68 at 8).

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likely to elect their preferred candidate." *See also Badham v. March Fong Eu*, 694 F. Supp. 664, 675 (N.D.Cal.1988) ("The First Amendment guarantees the right to participate in the political process; it does not guarantee political success."), *aff'd mem.*, 488 U.S. 1024, 109 S. Ct. 829, 102 L.Ed.2d 962 (1989). For this reason, I would hesitate to draw a parallel to the one-person-one-vote line of cases, as the majority has done.

Even if vote dilution, as described by Plaintiffs, does amount to a constitutional harm, I greatly doubt that such a harm is of the same order as the harm citizens suffer in the context of political patronage, the doctrinal comparator on which Plaintiffs largely rely. See Samuel Issacharoff & Pamela S. Karlan, *Where to Draw the Line?: Judicial Review of Political Gerrymanders*, 153 U. Pa. L. Rev. 541, 563 (2004) ("[T]he burden that the plaintiffs in the patronage cases experienced fell on them outside the political process: they lost jobs as public defenders or road workers or were denied contracts to haul trash or tow cars . . . . By contrast, in a political gerrymandering case, the question whether 'an apportionment has the purpose and effect of burdening a group of voters' representational rights' requires deciding what voters' 'representational rights' are." (footnote omitted)).

The problem lies in the nature of political affiliation itself. Unlike race, one's status as a Republican or a Democrat is not, as Justice Scalia put it, an "immutable characteristic, but may shift from one election to the next; and even within a given election, not all voters follow the party line." *Vieth*, 541 U.S. at 287, 124 S. Ct. 1769 (plurality opinion). Justice O'Connor made a similar point in *Bandemer*, writing that "while membership in a racial group is an immutable characteristic, voters can—and often do—move from one party to the other or support candidates from both parties. Consequently, the difficulty of measuring voting strength is heightened in the case of a major political party." 478 U.S. at 156, 106 S. Ct. 2797 (O'Connor, J., concurring in the judgment). Maryland's 6th Congressional District is illustrative: while in 2012 the Democratic challenger, John Delaney, defeated Roscoe Bartlett, the incumbent Republican, by an almost twentyone percent margin of victory, just two years later Delaney beat Republican challenger Dan Bongino by a mere 1.5%.[5] Thus, while the majority sensibly contends that the State may not "intentionally drown out the voices of certain voters by reason of their views," *supra* at 598, the problem with Plaintiffs' theory (and, more broadly, with *all* political gerrymandering claims, whether brought on First Amendment or equal protection grounds) is that courts are not equipped to distinguish those circumstances in which the State has

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[5] These statistics are publicly available at http://elections.state.md.us, and may be considered at the Rule 12(b)(6) stage. *See Hall v. Virginia*, 385 F.3d 421, 424 n. 3 (4th Cir. 2004) (explaining that, where voter statistics are publicly available at state legislative website, courts may take judicial notice of this information on motion to dismiss).

drowned out particular voices from those circumstances in which the chorus has voluntarily changed its tune.

Because of the inherent mutability of political affiliation, the Court cannot simply compare the results of an election conducted pursuant to Map X with those of a subsequent election conducted pursuant to Map Y and blame any shift in power on redistricting: each election cycle is unique, and voter behavior is as unpredictable as the broader societal circumstances that may make one candidate, or one party, more appealing than the other to particular voters and communities. For that matter, treating a prior map as a baseline for measuring the constitutionality of a subsequent map assumes that the prior map was itself free of impermissible manipulation—yet we know, as a practical matter, that gerrymandering is widespread in our political system and as old as the Republic. *See* Kasper, *supra*, at 411; *cf. LULAC*, 548 U.S. at 446, 126 S. Ct. 2594 (Kennedy, J.) ("There is no reason . . . why the old district has any special claim to fairness.").[6]

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[6] The majority acknowledges, *supra* at 35, that a prior map "may well have been drawn for partisan reasons, and the State can redraw its boundaries for any number of reasons" so long as those reasons do not include partisan retaliation. But my point here goes, once again, to the question of burden: if Map X was badly gerrymandered to advance Republican interests, and Map Y is thereafter designed to promote Democratic interests, I am not certain that Republican voters who may have been indirectly impacted by the redistricting initiative have suffered a burden for which the Constitution affords redress. Put differently, if political gerrymandering is as universal and longstanding a problem as Plaintiffs and *amici* suggest, then it may be unhelpful to treat any one particular map, which may have the effect of correcting for or offsetting a prior gerrymander, as imposing

Plaintiffs hasten to reassure the Court that, whatever the boundaries or implications of their proposed standard in other, future cases, in *this* case the answer could not be clearer: through savvy political engineering, the State cracked a congressional district and wrested a seat from longheld Republican control. I am compelled to wonder how Plaintiffs might seek to *prove* that claim: Plaintiffs, after all, are just nine committed or occasional Republican voters residing in two districts comprising many hundreds of thousands of residents. Plaintiffs could take the stand and testify about their personal voting histories, and they could perhaps invite their friends and associates to do so as well. But such testimony would shed no meaningful light on the circumstances surrounding the 2012 and 2014 congressional elections. Nor, for the reasons I have already set forth, would statistical sampling, voter registration history, or any other known data set provide reliable evidence from which the Court could ascertain whether *in fact* the alleged gerrymander was outcome determinative.

Even were I to presume on the unusual facts of this case—the broken-winged pterodactyl and so forth—that the gerrymander *was* outcome determinative, such a presumption would bring me no closer to a reliable framework that I, and other judges, might employ in future cases involving subtler partisan engineering. At bottom, Plaintiffs' purported standard is a variation on Justice Stewart's much-maligned adage, "I know it when I see it," *Jacobellis v. Ohio*, 378 U.S. 184, 197, 84 S. Ct. 1676, 12 L.Ed.2d 793 (1964) (Stewart, J., concurring). *Ad hoc* decision

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a particularized burden on a discrete partisan subset of the voting population.

making and judicial stargazing cannot take the place of "clear, manageable, and politically neutral standards for measuring the particular burden a given partisan classification imposes on representational rights," as "[a]bsent sure guidance, the results from one gerrymandering case to the next would likely be disparate and inconsistent," *Vieth*, 541 U.S. at 307–08, 124 S. Ct. 1769 (Kennedy, J., concurring in the judgment); *see also id.* at 291, 124 S. Ct. 1769 (plurality opinion) (explaining that a reliable criterion is "necessary to enable the state legislatures to discern the limits of their districting discretion, to meaningfully constrain the discretion of the courts, and to win public acceptance for the courts' intrusion into a process that is the very foundation of democratic decisionmaking").

III. Conclusion

There may yet come a day when federal courts, finally armed with a reliable standard, are equipped to adjudicate political gerrymandering claims.[7] Or

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[7] In the absence of a reliable standard, the Supreme Court may nevertheless intervene—or, more likely, direct lower-court intervention—should a truly exorbitant fact pattern emerge. At oral argument in a case heard the same day as this matter, *Parrott v. Lamone*, Civ. No. GLR-15-1849, plaintiffs' counsel hypothesized that highly sophisticated demographic software might make it possible for blatantly partisan redistricting commissions to draw district lines between apartment units or rooms in a single-family home. The hypothetical is absurd, but the notion that sophisticated mapmakers could draw lines around favored (and disfavored) communities or even streets is not inconceivable. At some point, mapmaking that makes a mockery out of representative democracy may necessitate inelegant judicial intervention, and the Supreme Court may require lower courts to stand guard at the outer perimeter of rationality. *See Cox v. Larios*, 542 U.S. 947, 950, 124 S. Ct. 2806, 159

perhaps political gerrymandering (at least in extreme cases) will be corrected by the voters themselves, who after all bear the ultimate power—if they unite—to bring about political change. *See Bandemer*, 478 U.S. at 144, 106 S. Ct. 2797 (Burger, C.J., concurring in the judgment) ("In my view, the Framers of the Constitution . . . placed responsibility for correction of such flaws in the people, relying on them to influence their elected representatives."). In any event, I am not persuaded that Plaintiffs here have discovered a viable solution. And even having accepted several of Plaintiffs' unproven premises for purposes of my analysis on this Rule 12(b)(6) motion (*i.e.*, that the First Amendment is the relevant constitutional provision, that vote dilution as Plaintiffs characterize it might amount to a constitutional harm, and that the GRAC acted with the purpose and effect of targeting Republican voters), I have been unable—like a majority of Justices and every lower court to take up the question since *Vieth*—to devise a standard on which courts might reasonably rely. Consequently, I must part company with my esteemed colleagues on the panel. I would dismiss Plaintiffs' Second Amended Complaint with prejudice.

L.Ed.2d 831 (2004) (Stevens, J., concurring) (" '[T]he unavailability of judicially manageable standards' cannot justify a refusal 'to condemn even the most blatant violations of a state legislature's fundamental duty to govern impartially.' " (citation omitted)).

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

O. John Benisek, et al.,
Plaintiffs,
vs.
Linda H. Lamone, et al.,
Defendants.
Case No. 13-cv-3233
Three-Judge Court

NOTICE OF APPEAL

PLEASE TAKE NOTICE that plaintiffs O. John Benisek, Jeremiah DeWolf, Sharon Strine, Charles W. Eyler, Jr., Alonnie L. Ropp, Edmund Cueman, and Kat O'Connor hereby appeal to the Supreme Court of the United States from this Court's August 24, 2017 opinion and order denying their motion for a preliminary injunction (Dkts. 202, 203) and from each and every opinion or ruling that merged therein.

This appeal is taken under 28 U.S.C. § 1253.

August 25, 2017

Respectfully submitted,
/s/ Michael B. Kimberly